Supreme Court, U.S.
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In The
Supreme Court of The United States

AMALGAMATED TRANSIT UNION, AFL-CIO, CLC, and NATIONAL LOCAL 1700-ATU, AFL-CIO, CLC,

Petitioners,

v.

CARL EDWARD NIEHAUS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and its progeny, Labor Management Relations Act § 301 pre-empts state-law claims if a labor contract must be interpreted. Petitioners and respondent were completely at odds over the labor contract's meaning and whether respondent had any rights under that contract, and the complaint's state-law claims were based on those disagreements. But the Ninth Circuit held that there was no dispute over the contract's meaning – and those claims were not pre-empted – because respondent disavowed reliance on the contract for the first time on appeal. The Ninth Circuit's holding allowing plaintiffs to escape federal pre-emption through appellate advocacy: (1) conflicts with *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) and *Redmond v. Dresser Indus., Inc.*, 734 F.2d 633 (11th Cir.1984) (*per curiam*), both of which focus on plaintiff's complaint; (2) cannot be confined to § 301 pre-emption; and (3) threatens to make federal removal jurisdiction hinge on the "well-pleaded appellate brief."

When plaintiff's complaint alleges state-law claims that require interpretation of a labor contract, may plaintiff evade pre-emption under Labor Management Relations Act § 301 by disavowing reliance on the labor contract on appeal?

PARTIES TO THE PROCEEDINGS

Since January 1, 1994, petitioner National Local 1700-ATU, AFL-CIO, CLC has been the exclusive bargaining representative for employees of Greyhound Lines, Inc. Local 1700 is affiliated with the international union, petitioner Amalgamated Transit Union, AFL-CIO, CLC. Respondent is Carl E. Niehaus.

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IN THE
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No.

AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,
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---

PETITION FOR A WRIT OF CERTIORARI

Amalgamated Transit Union, AFL-CIO, CLC and National Local 1700-ATU, AFL-CIO, CLC petition this

Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review that court's judgment.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 173 F.3d 1207, and reprinted in Appendix A. (Apdx. A-1-13). The opinion of the United States District Court for the District of Nevada is unreported, and reproduced in Appendix B. (Apdx. B-16-42). The reports and recommendations of the United States Magistrate Judge for the District of Nevada are unreported; they are reproduced in Appendix B. (Apdx. B-47-92).

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1999. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 25, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Statement of Facts

Although Carl Niehaus's dispute culminated on January 16, 1995 – when his employer, Greyhound Lines, Inc., allegedly terminated his employment – it has its genesis in 1986, when Greyhound promoted Niehaus to a supervisor, and in 1994, when he attempted to return to a bargaining-unit position from management. As articulated in his complaint, Niehaus was orally assured that he had a right under the labor contract to return to a bargaining-unit position if he ever left Greyhound management despite that contract's two-year limitation on that right. (Apdx. B-95-97, 106-107 ¶¶ 14-15, 22-24, 83, 88).

1. *Niehaus's first verbal agreement over his "right" to return to the bargaining unit.* Between 1961 and 1986, Niehaus was a Greyhound station employee represented by Amalgamated Transit Union Local 1225, which was affiliated with the Amalgamated Transit Union (International Union). His bargaining-unit positions were governed by collective-bargaining agreements between Greyhound and the Amalgamated Council of Greyhound Local Unions, which included Local 1225.

In 1986, Greyhound offered Niehaus a promotion to management. While considering this proposal, Niehaus sought the advice of Local 1225 president Russell Buell about returning to a bargaining-unit position in the future. The labor contract then in effect specifically addressed his right to maintain his seniority – and return to the bargaining unit – after accepting a management position:

> Effective December 3, 1983, employees under the terms of this agreement represented by Locals 1055, 1222, 1223, 1225, 1384, and 1508 accepting official positions with the Company will retain, but not accumulate seniority.

According to Niehaus, he and Buell entered into a verbal contract separate from the collective-bargaining

agreement over his "right" to return to the bargaining unit. But this so-called agreement mirrored his rights under the labor contract: according to Niehaus, if he accepted Greyhound's offer, he had a right to return to a bargaining-unit position "under the current working agreement," but his seniority would be frozen. Niehaus understood that this verbal agreement was Buell's "interpretation of the Collective Bargaining Agreement." In June 1986, Niehaus accepted Greyhound's offer.

2. *Niehaus's second verbal agreement over his "right" to return to the bargaining unit.* Between June 1986 and 1994, Greyhound promoted Niehaus to higher-level management positions. During this period, there were major changes in Greyhound's relationship with the unions representing its bargaining-unit employees. Because of a three-year strike ending in 1993, membership in the local unions that comprised the Amalgamated Council declined precipitously. The International Union imposed a trusteeship on the Amalgamated Council and formed one national union – Local 1700 – to represent Greyhound's employees. On January 1, 1994, Local 1700 became the exclusive bargaining representative for Greyhound's employees.

Local 1700 inherited the 1993-1999 labor contract between Greyhound and the Amalgamated Council, which restricted supervisors' right to return to the bargaining unit to

employees who exercised that right within two years of taking a management job:

SUPERVISORY SENIORITY

> Unit employees accepting supervisory positions with the Company shall retain but not accumulate seniority during the first twenty-four (24) months in such positions, and shall suffer no loss of seniority if they return to the unit within that time.
>
> Employees in supervisory positions who desire to return to contract positions shall do so under the provisions applicable to those employees on indefinite leave with a fifteen (15) day notice to the Company and the Union.

This contract established a four-step grievance procedure for an employee's contract grievance, which "[a]ny employee covered by this Agreement" could invoke. The procedure culminated in final and binding arbitration if the Union pursued the grievance that far.

By 1994, Niehaus was disenchanted with Greyhound, but decided not to quit after he learned that resignation would

adversely affect his pension. Instead, Niehaus approached Local 1225 president Buell to again "verify" his right to obtain a bargaining-unit position, and entered what he considered a second verbal agreement over this right. Under this agreement, Niehaus could return to a bargaining-unit position, but would lose any accumulated seniority because he had been in management for more than two years. Niehaus understood that this verbal agreement was also Buell's interpretation of the labor contract.

3. *Niehaus's "termination"*. On January 2, 1995, Niehaus wrote to his Greyhound supervisor – James Camp – notifying him of his "decision to return to the Amalgamated Transit Union unit effective January 16, 1995," and "relinquishing" his supervisor job. Niehaus identified the authority for this "transfer" as "the current working agreement between Greyhound Lines Inc. and the Amalgamated Council of Greyhound Local Unions titled: SUPERVISOR SENIORITY." Niehaus's use of the phrase "working agreement" meant the labor contract between Greyhound and the Amalgamated Council. Niehaus also sent notice to Local 1700 of his "decision to return to a contract position with Greyhound Lines, Inc." Niehaus's letter stated that his "decision to return" was based on the "[p]rovisions in the current working agreement . . . ."

But things did not materialize as Niehaus had anticipated. Camp viewed Niehaus's letter as a resignation, and initiated the paperwork to process him as resigning.

Although Local 1700 had prosecuted a grievance for another Greyhound supervisor – James Thaxton – who attempted to return to the bargaining unit, Niehaus did not file a grievance under the labor contract. Instead, between March 1995 and November 1995, he engaged in a letter-writing campaign, unsuccessfully attempting to win Local 1700 and the International Union over to his view that he had the right, under the labor contract's Supervisory Seniority clause, to return to the bargaining unit.

Proceedings

Niehaus sued Greyhound, Camp, the International Union, and "Does 1 through 10" in the Second Judicial District Court, State of Nevada. The International Union timely removed this case to the United States District Court for the District of Nevada under 28 U.S.C. § 1441(a); Greyhound and Camp joined in this removal. Niehaus then filed an amended complaint in federal court which added Local 1700. Niehaus ultimately settled his claim against Greyhound and Camp; the "Doe" defendants were never served.

Niehaus's complaint alleged eight claims, three arising under federal law – age discrimination, breach of the labor contract, and breach of the duty of fair representation – and the rest based on state law. His complaint specifically relied on the Supervisory Seniority provision of Greyhound's labor contract for those state-law claims. (Apdx. B-95-97, 100-101, 104, 106-107 ¶¶ 12-14, 21-24, 48-49, 51, 69, 83, 88).

Although the magistrate judge concluded that Niehaus's state-law claims – as alleged in his complaint – required interpretation of the labor contract, the district court held that those claims were not pre-empted and remanded them to the Nevada court. (Apdx. B-36-40, 43-46, 55-60 , 86-92).

The Ninth Circuit held that Niehaus's state claims did not require interpretation of the labor contract "because the parties do not dispute the meaning of any of its relevant provisions." (Apdx. A-12). The court recognized that before Niehaus filed this lawsuit, the parties had clashed over whether Niehaus had a right under that contract to return to the bargaining unit. (Apdx. A-4-5). But the court held that the relevant time frame for analyzing pre-emption was Niehaus's appellate submission, and accepted his concession "both in his brief and at oral argument, that he has no rights under the collective bargaining agreement and that he will not rely on

the collective bargaining agreement to establish his state law claims." (Apdx. A-10, 12).

REASONS FOR GRANTING THE WRIT

This case presents an important, specific issue about the proper focal point for analyzing whether state-law claims are pre-empted by Labor Management Relations Act § 301. The Ninth Circuit held that whether those claims require interpretation of the labor contract is judged by plaintiff's appellate submissions rather than the allegations of the complaint. That holding squarely conflicts with those of the Third and Eleventh Circuits in *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) and *Redmond v. Dresser Indus., Inc.*, 734 F.2d 633 (11th Cir.1984)(*per curiam*), and is inconsistent with *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and its progeny.

The Ninth Circuit erred as a matter of law in looking only to Niehaus's state-law claims as articulated in his appellate submission rather than how those claims were framed in his complaint. If this were only a dispute about the specific supervisor-seniority clause in this case, the court's error might not merit review here. But the significance of this issue transcends these parties and this contract. The Ninth Circuit's analysis will allow plaintiffs to evade federal pre-

emption of their state-law claims by disavowing reliance on the collective-bargaining agreement at the end of the litigation process, and expose all such labor contracts to potentially inconsistent interpretation under state law. There is no principled way to contain the Ninth Circuit's rule from spilling over into other areas that Congress intended federal law to prevail. And the Ninth Circuit's rule will erode well-settled removal jurisdiction: a defendant's right to remove will no longer depend on whether plaintiff's *complaint* alleges a federal claim, but whether his *appellate brief* does as well.

A. The Ninth Circuit's gauging federal pre-emption from plaintiff's appeal and not the complaint conflicts with the Third and Eleventh Circuits.

Redmond and *Malia* involved claims that are analytically indistinguishable from the instant dispute. In *Redmond*, plaintiff transferred from a bargaining-unit to a management position under a labor contract that permitted such employees to return to the bargaining unit if they were no longer needed as supervisors. This contract was succeeded by one that imposed a six-month deadline on supervisors' rights to return to bargaining-unit jobs. 734 F.2d at 634. After 12 years as a manager, plaintiff was not allowed to return to the bargaining unit, and sought to avoid the contract's six-month limitation through a state-tort action. *Id.* at 634-635. In

holding plaintiff's state claims pre-empted, the Eleventh Circuit focused on those claims as articulated in the complaint. *Id.* at 635. And in *Malia*, the Third Circuit concentrated on plaintiff's complaint to determine whether the state-contract claim that a supervisor had the right to return to the bargaining unit was pre-empted. 794 F.2d at 912-913. By gauging federal pre-emption at the litigation's conclusion rather than its inception, the Ninth Circuit's analysis irreconcilably diverges from that of the Third and Eleventh Circuits.

B. The Ninth Circuit's gauging federal pre-emption from plaintiff's appeal cannot be reconciled with *Allis-Chalmers* and its progeny, and will breed all the evils *Allis-Chalmers* sought to preclude.

The focus of the Third and Eleventh Circuits is the correct understanding of the pre-emptive force of § 301 and the proper reading of *Allis-Chalmers* and its progeny. Section 301 authorizes courts to develop a federal substantive law to govern disputes arising over labor contracts. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102-103 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd. of California v. Construction Laborers*

Vacation Trust for Southern California, 463 U.S. 1, 23 (1983), quoting § 301.

1. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) held that state-law claims that define "what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement" are pre-empted by federal law. But Congress did not intend to pre-empt independent state claims that do "not require construing the collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). Simply stated, state-law claims are pre-empted if there is a "dispute" over the labor contract's meaning. *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994).

2. The Ninth Circuit recognized that at the litigation's inception, Niehaus and the unions disputed his right under the labor contract to return to the bargaining unit. (Apdx. A-4-5). The court discounted that dispute because Niehaus finally capitulated to the unions' interpretation of the labor contract on appeal. (Apdx. A-10, 12). But this Court has looked to the state-law claims as crafted in plaintiff's complaint to determine if they are pre-empted. *United Steelworkers of America v. Rawson*, 495 U.S. 362, 369-370 (1990); *International Brotherhood of Elec. Workers v. Hechler*, 481 U.S. 851, 859-862 (1987). That focus is required because identical facts can give rise to a breach of

the labor contract and independent state claims. *Lingle v. Norge Div. of Magic Chef, Inc., supra*, 486 U.S. at 409-410. As master of his complaint, Niehaus chose to characterize his claim as a dispute over the meaning of the contract's Supervisory Seniority clause. The Ninth Circuit should have held him to the consequences of that election.

If the Court grants a writ of certiorari, petitioners will argue – as an alternative ground supporting reversal – that the Ninth Circuit was wrong in characterizing the evidence of Niehaus's agreements with Buell.

3. The radically new doctrine announced by the Ninth Circuit will breed all of the evils *Allis-Chalmers* sought to foreclose. First, pre-emption "preserves the central role of arbitration . . . ." *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 219. The presumption that disputes over the labor contract's meaning should be arbitrated recognizes "that arbitrators are in a better position than courts *to interpret the terms of a CBA*." *Wright v. Universal Maritime Service Corp.*, ___ U.S. ___, 119 S.Ct. 391, 395 (1998) (emphasis in original). And there is a well-settled body of arbitral precedent governing supervisors' rights to return to the bargaining unit. *West Penn Power Co.*, 92 LA 425 (1989); *Mississippi Valley Equip. Co.*, 87 LA 21 (1986); *Southeastern Greyhound Lines*, 33 LA 150 (1959).

Second, the Ninth Circuit's standard substitutes litigation's uncertainties for the parties' bargain. Parties will not be able to predict how their contract will be interpreted – and whether that interpretation will be under a federal or state standard – until the appeal runs its course. This instability would render the employer and union "uncertain as to what they were binding themselves to when they agreed to create a right" under the contract. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211; *Teamsters v. Lucas Flower Co.*, *supra*, 369 U.S. at 103-104. Greyhound operates in the 48 continental United States. If the Ninth Circuit's decision stands, its contract with Local 1700 will be subject to interpretation by virtually every State.

Finally, the Ninth Circuit's rule invites clever, pre-textual litigation to avoid the consequences of pleading a claim based on the labor contract. This rule encourages "form over substance," allowing plaintiffs to escape § 301 pre-emption through artful appellate advocacy. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211. And there is nothing that limits the Ninth Circuit's rule to appeals: at virtually any point in the litigation, plaintiffs could disavow reliance on the labor contract to escape pre-emption. To resolve the conflict between the Third and Eleventh Circuits and the decision below, this Court should grant a writ of certiorari and overturn the Ninth Circuit's decision.

C. The Ninth Circuit's gauging federal pre-emption from plaintiff's appeal will spill into other substantive areas, and create a new standard for federal removal jurisdiction: the "well-pleaded appellate brief."

This Court should review the Ninth Circuit's decision because it transcends these parties, this contract, and § 301 pre-emption: the Ninth Circuit's standard will spill over into other substantive pre-emption doctrines and threatens to erode federal removal jurisdiction.

1. There is no-principled way to contain the Ninth Circuit's rule because § 301 pre-emption is the model this Court and Congress use in other substantive pre-emption fields. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994) (Railway Labor Act); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-56 (1987) (Employee Retirement Income Security Act of 1974); *cf. El Paso Natural Gas Co. v. Neztsosie*, ___ U.S. ___, 119 S.Ct. 1430, 1437 n.6 (1999) (Price-Anderson Act's "unusual preemption provision" models "'complete pre-emption' doctrine").

2. But the corrosive nature of the Ninth Circuit's rule threatens to spread to federal removal jurisdiction, as well. Such jurisdiction is now governed by the "well-pleaded complaint" and "artful pleading" doctrines. *Rivet v. Regions*

Bank, 522 U.S. 470, 474-476 (1998); *see Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987). Among the "paramount policies" of these doctrines is that a plaintiff may have the claim heard in state court by choosing to plead only state claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-399 (1987). The Ninth Circuit invites courts to abdicate removal jurisdiction based on plaintiffs' disavowal of the basis for removal on appeal, a rule this Court flatly rejected more than half a century ago. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938) ("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of removal . . .").

CONCLUSION

The Ninth Circuit's standard injects an unacceptable degree of uncertainty into the meaning of labor contracts between employers and labor organizations. It effectively allows plaintiffs to evade federal pre-emption by disavowing reliance on the labor contract at the litigation's conclusion, thus depriving the parties to that contract of their agreed-upon dispute-resolution procedure. This Court should grant certiorari to resolve the conflict between this case and the Third and Eleventh Circuits, vacate the Ninth Circuit's judgment, and direct that Niehaus's case be dismissed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL E. NIEHAUS, *Plaintiff-Appellee,* v. GREYHOUND LINES, INC., *Defendant,* AMALGAMATED TRANSIT UNION, AFL-CIO, CLC, and NATIONAL LOCAL 1700-ATU, AFL-CIO, CLC, *Defendants-Appellants.*	No. 97-17384 D.C. No. CV-96-00425-ECR OPINION

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Argued and Submitted
February 9, 1999--San Francisco, California

Filed April 12, 1999

Before: Harlington Wood, Jr.,* David R. Thompson, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Wood, Jr.

COUNSEL

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Joseph E. Orzano, Reno, Nevada, for the plaintiff-appellee.

OPINION

WOOD, Jr., Circuit Judge:

Plaintiff-appellee Carl E. Niehaus was employed by Greyhound Lines, Inc. from 1961 until 1995. Niehaus lost his job with Greyhound in January 1995 and soon thereafter filed a wrongful termination lawsuit in Nevada state court against Greyhound, the Amalgamated Transit Union, which represented Greyhound employees, and several individuals. The defendants removed the case to federal court. After disposing of all of Niehaus' federal claims, the district court held that his remaining state law claims were not preempted by federal labor law and remanded the matter to state court. Defendant-appellants, Amalgamated Transit Union and

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*The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

Amalgamated Transit Union Local 1700, appeal, arguing that preemption was mandatory under the facts of this case, and that the district court's decision to remand the matter to state court was therefore in error.

I. BACKGROUND

From 1961 until 1986, Carl Niehaus was employed as a Greyhound "station employee" in various positions, all of which were represented by Amalgamated Transit Union Local 1225 ("Local 1225"), a local union affiliated with the Amalgamated Transit Union ("International Union"). In 1986, Niehaus was offered a non-union position in Greyhound management. Niehaus claims that while he was considering the move to management, Russell Buell, the president of Local 1225, assured him that he could return to union status if he ever left Greyhound management. At that time, the collective bargaining agreement applicable to Niehaus' position provided:

> All present bargaining unit members who had accepted supervisory status prior to December 3, 1983, will continue to retain and accumulate seniority as in the past. Effective December 3, 1983, employees under the terms of this agreement represented by Locals 1055, 1222, 1223, 1225, 1384, and 1508 accepting

official positions with the Company will retain, but not accumulate seniority.

In June 1986, Niehaus accepted the management position. He remained in management until January 1995. Niehaus claims that, in 1994, he consulted his supervisors at Greyhound and Buell about his decision to return to the union. In early January 1995, Niehaus notified both Greyhound and Amalgamated Transit Union Local 1700 ("Local 1700")[1] of his "decision to return to the Amalgamated Transit Union unit effective January 16, 1995," and that he was "relinquishing the supervisory position of Customer Service Manager." Niehaus asserts that he believed that, in order to return to the union, he had to resign from management, notify the union of his decision to return, and wait to be reinstated by the union. However, Local 1700 informed Niehaus that, because he had been in a management position for longer than two years, he did not have a right to return to union status based on the new collective bargaining agreement which went into effect March 19, 1987. This agreement provided:

Unit employees accepting supervisory

---

[1]After January 1, 1994, Local 1225 no longer represented Greyhound employees. At that time, Local 1700 became the exclusive bargaining representative for Greyhound employees.

> positions with the Company shall retain seniority during the first twenty-four (24) months in such positions, and shall suffer no loss of seniority if they return to the unit within that time.

Meanwhile, Greyhound treated Niehaus' notification as a resignation. Niehaus contacted Local 1700 and then the International Union repeatedly, attempting to convince them of his "right" to return to union status. The unions continued to assert that Niehaus had no right to return to union status and would have to apply to Greyhound as a new employee. If he was hired, he could then return to the union.

In June 1996, Niehaus filed suit in Nevada state court against Greyhound, his former supervisor, and the International Union. The defendants removed the lawsuit to federal court, where Niehaus filed an amended complaint adding Local 1700 as a defendant. The amended complaint raised three federal claims: breach of the collective bargaining agreement, breach of the duty of fair representation, and age discrimination. It also raised state law claims for fraud, negligent misrepresentation, breach of the covenant of good faith, and breach of contract. Local 1700 filed a motion for summary judgment. The International Union filed a motion to dismiss, which the court treated as a motion for summary judgment because it included matters outside the pleadings. While these motions were pending,

Niehaus settled with Greyhound and his former supervisor.

On September 30, 1997, the district court issued an order dismissing Niehaus' duty of fair representation and collective bargaining claims for lack of standing, holding that Niehaus was neither a member of the bargaining unit covered by the 1987 collective bargaining agreement or a third party beneficiary of that agreement. The court also granted summary judgment to the defendants on Niehaus' age discrimination claim based on the conclusion that Niehaus had failed to make out a prima facie case of age discrimination. The court held that, to the extent that Niehaus was claiming that the defendants breached the collective bargaining agreement, his state law claims were preempted by federal labor law. However, the court determined that Niehaus had alleged other, independent claims arising from a separate contract that Niehaus contends existed between himself and the unions, based on his consultations with union official Buell. Because Niehaus was not subject to the collective bargaining agreement, the court reasoned that this separate contract could not have covered rights included in the collective bargaining agreement and, therefore, Niehaus' state law claims were not based directly on rights created by the collective bargaining agreement. Furthermore, because the court found that Niehaus had no rights under the collective bargaining agreement, it held that his claims neither relied upon nor required an interpretation of that agreement. Therefore, the court held that Niehaus' state law claims based

on an alleged separate contract were not preempted and remanded the matter to state court. After filing an unsuccessful Fed. R. Civ. P. 59(e) motion, the International Union and Local 1700 brought this appeal, asserting that Niehaus' state law claims are completely preempted by federal labor law and, therefore, the district court erred in remanding the matter to state court.

II. ANALYSIS

As an initial matter, Niehaus asserts that this court does not have jurisdiction to review the district court's remand of his pendant state claims. However, a district court order remanding pendant state claims on discretionary grounds is not a remand on jurisdictional grounds pursuant to 28 U.S.C. § 1447(c), *Lee v. City of Beaumont*, 12 F.3d 933, 935 (9th Cir. 1993), and we may review remand orders based on grounds other than those set forth in § 1447(c). *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996). Furthermore, Appellants have presented their appeal in the proper form for review. The district court made the substantive decision that the state law claims were not preempted by federal law, *see Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1539 (9th Cir.1992), and when a remand order is based on a substantive determination of the merits, the order is reviewable on appeal as a final collateral order. *Lee*, 12 F.3d at 936. We have jurisdiction pursuant to 28 U.S.C. §

1291 and turn our attention to the merits of Appellants' claims.

The unions argue that the district court erred in remanding Niehaus' state law claims to state court because the claims were preempted by federal labor law. A district court's decision that state law claims are not preempted by federal law is a question of law which we review *de novo*. *Toumajian v. Frailey,* 135 F.3d 648, 652 (9th Cir. 1998).

[1]"Section 301 of the Labor Management Relations Act (LMRA) preempts state law claims that are based directly on rights created by a collective bargaining agreement as well as claims that are substantially dependent on an interpretation of a collective bargaining agreement." *Beals v. Kiewit Pacific Co., Inc.*, 114 F.3d 892, 894 (9th Cir. 1997) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987)). This is to ensure uniform interpretation of collective bargaining agreements. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988). The unions argue that all of Niehaus' state law claims require interpretation of the collective bargaining agreement's Supervisor Seniority clause and that preemption is therefore mandatory. Niehaus asserts that his claims are not based at all on the collective bargaining agreement but rather on two "verbal agreements" that he entered into with Russell Buell, the president of the local union. Niehaus claims that his consultations with Buell, before accepting the management position and at the time he decided to return to union status, resulted in verbal

agreements in which the unions, through Buell, assured Niehaus that he could transfer from a supervisory position to a union membership position. Niehaus contends that, through these verbal agreements, the unions promised to assist him in returning to a union position within Greyhound, should he decide to resign his management position.

[2]The unions first assert that Niehaus has conceded that his claims require interpretation of the collective bargaining agreement. For support, they point to Niehaus' testimony in his deposition that the two verbal agreements were based on Buell's interpretation of the collective bargaining agreement. However, even if Buell relied on his interpretation of the collective bargaining agreement in his consultations with Niehaus, it would not affect the determination of whether Buell entered into a separate agreement to assist Niehaus in returning to a union position within Greyhound. Niehaus' testimony does not preclude his state law claims. We therefore must determine whether Niehaus' state claims require interpretation of the collective bargaining agreement.

[3] Niehaus asserts three contract law claims which allege that the unions breached both the covenant of continued employment and the implied covenant of good faith and fair dealing and interfered with Niehaus' contract for continued employment with Greyhound. Niehaus bases his

contract claims on what he refers to as his "specifically contracted right (completely apart from the [collective bargaining agreement]) to receive the Unions' cooperation in his transfer from management to a working level position, and the Unions' agreement to reinstate his membership in the union." He asserts that the unions were obligated to cooperate in his transfer to a union position because a union official promised him that he would be able to make the transfer. While these claims may give rise to contract defenses which reference the collective bargaining agreement, when the meaning of the terms of a collective bargaining agreement are not disputed, the mere fact that a collective bargaining agreement will be consulted in the course of state law litigation does not require preemption. *Associated Builders & Contractors, Inc. v. Intern. Brotherhood Of Elec. Workers*, 109 F.3d 1353, 1357 (9th Cir. 1997) (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)). The meaning of the collective bargaining agreement in the present case is not in dispute. Niehaus has conceded, both in his brief and at oral argument, that he has no rights under the collective bargaining agreement and that he will not rely on the collective bargaining agreement to establish his state court claims. These claims are appropriately remanded to state court.

[4] Niehaus also raises fraud and negligent misrepresentation claims based on the fact that the union

allegedly informed him that he would not be discharged, or treated as resigned, as a consequence of the vacating of his management position in order to return to union status. Under Nevada law, the elements of a fraud claim are (1) defendant's false representation; (2) knowledge that the representation was false; (3) intent to defraud, i.e., to induce the plaintiff to act or refrain from acting; (4) justifiable reliance; and (5) damages. *Bulbman, Inc. v. Nevada Bell,* 825 P.2d 588, 592 (Nev. 1992). Furthermore, the Nevada Supreme Court, in *Bill Stremmel Motors, Inc. v. First National Bank of Nevada*, 575 P.2d 938, 940 (Nev. 1978), adopted the Restatement (Second) of Torts definition of negligent misrepresentation, which states:

> One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

[5]Niehaus claims that he relied upon Buell's promise that he could transfer from management to a union position

whenever he so desired. The unions assert that, for both the fraud and negligent misrepresentation claims, Niehaus would have to show that his reliance was justified in light of the collective bargaining agreement, "[s]ince Niehaus' attempt to transfer from a supervisor position to one within the bargaining unit was covered by the collective bargaining agreement." However, determining whether Niehaus' reliance on Buell's statements was justified in light of the collective bargaining agreement does not call for an interpretation of the agreement because the parties do not dispute the meaning of any of its relevant provisions. Niehaus concedes that he has no rights under the agreement, a position that the unions have embraced throughout the litigation. The resolution of Niehaus' tort claims requires a determination of whether Niehaus knew about the provisions of the collective bargaining agreement, not an interpretation of the agreement. *See Beals,* 114 F.3d at 895. The district court did not err in remanding these claims to state court. Additionally, if, in state court, Niehaus attempts to base his claims on interpretation of the collective bargaining agreement, the unions can raise preemption as a defense. *See, e.g., Union Pac. R.R. Co. v. Harding,* 958 P.2d 87 (Nev. 1998); *see also Associated Builders & Contractors, Inc.*, 109 F.3d at 1358 n.7 (holding that claims were not preempted and remanding them to state court while stating "our decision in no way precludes appellees from raising the defense of federal labor law preemption in state court.").

As a final matter, the unions argue that the district court erred in considering as part of its preemption determination the fact that, if Niehaus' state law claims were preempted, he would be left without a remedy. However, regardless of whether the district court should have considered Niehaus' potential lack of a remedy, the decision to remand was correct. A *de novo* review of the matter, without consideration of the potential lack of a remedy, shows that Niehaus' state law claims do not require the interpretation of a collective bargaining agreement and, therefore, are not preempted.

III. CONCLUSION

The decision of the district court is AFFIRMED.

STAMPED
FILED
MAY 25, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL E. NIEHAUS,	)	
	)	No. 97-17384
Plaintiff-Appellee,	)	
	)	
v.	)	D.C. No. CV-96-00425-ECR
	)	
GREYHOUND LINES, INC.,)		ORDER
Defendant,	)	
AMALGAMATED	)	
TRANSIT UNION,	)	
AFL-CIO, CLC, and	)	
NATIONAL LOCAL	)	
1700-ATU, AFL-CIO, CLC,	)	
Defendants-Appellants.	)	

Before: Harlington Wood, Jr.[1], David R. Thompson and Sidney R. Thomas, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[1]The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Stamped
U.S. District Court
District of Nevada
Entered & Served
September 30, 1997
Clerk, U.S. District Court
BY /s/ M DEPUTY

CARL E. NIEHAUS, Plaintiff,

v.

GREYHOUND LINES, INC., et al.,

Defendants.

CV-N-96-425-ECR

ORDER

Carl E. Niehaus, plaintiff in this action, initially filed this action in the Second Judicial District Court of the State of Nevada, on June 12, 1996, against his former employer, Greyhound Lines, Inc. ("Greyhound"); James Camp, plaintiff's former supervisor at Greyhound; and the Amalgamated Transit Union (the "International Union"). The International Union removed the action to this Court on July 8, 1996 (# 1), on grounds that plaintiff's claim for breach of the duty of fair representation was preempted by the

National Labor Relations Act, 29 U.S.C. § 141 et seq., and that all of plaintiff's other causes of action required interpretation of a collective bargaining agreement, and thus were also preempted by federal labor law. After removal, the International Union filed a motion to dismiss for failure to state a claim pursuant to F.R. Civ. P. 12(b)(6) (# 7), which was denied as moot when we granted leave to plaintiff to file a first amended complaint (# 41). The first amended complaint was filed on September 25, 1996, and added as a defendant Amalgamated Transit Union Local 1700 ("Local 1700" or "Local Union") (# 42).

On October 4, 1997, defendant International Union filed a second 12 (b) (6) motion to dismiss (# 47) , one of the motions currently pending before this Court. Plaintiff filed an opposition to this motion (# 62), to which defendant International Union has filed a reply(# 71). Plaintiff has also filed a supplement (# 112), to which defendant has filed a response (# 105), to which plaintiff has filed a reply (# 106). The parties have also incorporated by reference their pleadings filed with respect to the first motion to dismiss (# 7, # 23, # 29, # 30).

The matter was referred to the Magistrate Judge for all further pretrial matters on April 24, 1997 (# 116). On August 29, 1997, the Magistrate Judge issued her Report & Recommendation (#131). Defendants filed joint objections to the Magistrate Judge's Report (# 136), to which plaintiff filed a response (# 137), as well as a correction to his

response (# 138).

Since both parties have relied on matters outside the pleadings in arguing this motion, such as discovery responses and affidavits, the parties, as well as this Court, have treated the motion to dismiss as one for summary judgment, as did the Magistrate Judge in preparing her report.

In addition to defendant International Union's motion to dismiss, defendant Local 1700 filed a motion for summary judgment on October 21, 1997 (# 60). Plaintiff has filed an opposition to this motion (# 80) , to which Local 1700 has filed a reply (# 90) . Plaintiff has also filed a supplement to his opposition (# 115), to which Local 1700 has filed an opposition (# 118), to which plaintiff has filed a reply (# 121). Local 1700 has also filed an errata (# 86) , to which plaintiff has filed an objection (# 93). This motion was also referred to the Magistrate Judge. The Magistrate Judge filed her Report & Recommendation on August 29, 1997 (# 130). Defendants have filed joint objections to the Magistrate Judge's Report (# 136), to which plaintiff has filed a response (# 137).

Given the substantial overlap of the issues presented by the two motions pending before us, we have addressed both motions in this order.

BACKGROUND

Mr. Niehaus was employed by Greyhound in a position covered by a collective bargaining agreement for twenty-five years, from 1961 to 1986. During this time, he

was a member of Local 1225, a local union affiliated with defendant International Union. In 1986, Mr. Niehaus accepted a promotion to a management, non-union position. He claims that he was assured at that time that he could return to union status if he ever left Greyhound management. Mr. Niehaus remained in management until January of 1995. He claims that he made inquiries about returning to union status in late 1994, and was assured he could do so. In early 1995, he notified both Greyhound and Local 1700 of his "decision to return to the Amalgamated Transit Union unit effective January 16, 1995," and that he was "relinquishing the supervisory position of Customer Service Manager." Ltr. from Niehaus to Camp of ½/95. Apparently, plaintiff believed that he had to resign his position in management, notify the union of his decision to return to a contract position, and await reinstatement by the union, at which time he would resume work in a position represented by the union. After numerous communications with various union officials, but apparently none with Greyhound, Mr. Niehaus began to realize that his plan was not proceeding as he had anticipated. Thus he sought help from the courts. Further facts will be related as necessary to the following discussion.

DISCUSSION

Plaintiff's First Amended Complaint (# 42) sets forth seven causes of action: "Unlawful Discrimination based on Age against all Defendants"; "Wrongful Termination based on Breach of Implied Contract from service history against

Greyhound Lines Inc. and Does 1-10"; "Wrongful Termination based on Breach of Implied Contract to remain employed but in a different status against all Defendants"; "Fraud against all Defendants"; Misrepresentation against all Defendants"; "Breach of Covenant of Good Faith against Greyhound Lines, Amalgamated Transit Union, and ATU Local 1700"; and "Breach of Duty of Fair Representation against Amalgamated Transit Union and ATU Local 1700."

Essentially, there are four main issues which we address in turn below: (1) plaintiff's claim for breach of the duty of fair representation, implied in § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (i.e., the "unfair representation" half of what is known as a hybrid § 301/unfair representation claim); (2) plaintiff's claim for breach of the collective bargaining agreement between Greyhound and Local 1700, pursuant to § 301 of the LMRA, 29 U.S.C. § 185 (i.e., the "§ 301" half of a hybrid § 301/unfair representation claim)[1]; (3) plaintiff's age discrimination claims; and (4)

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[1]It should be noted here that plaintiff has, in his response to defendants' joint objections to the Magistrate Judge's Reports (# 137), requested leave to amend his complaint to specifically restate his breach of contract claims based on breach of the collective bargaining agreement as § 301 claims. Since plaintiff has already amended his complaint once, leave to amend again is at the discretion of this court. However, plaintiff should note that both the defendant unions and this Court have effectively treated his claims for breach of the collective bargaining agreement as § 301 claims. If it would make any difference to the outcome of this case, we would of course allow plaintiff to amend his complaint in

plaintiff's various state law claims.

Defendant Local 1700 has moved for summary judgment on all claims; defendant International Union has moved to dismiss for failure to state a claim, which we have treated as a motion for summary judgment as well, since both sides have introduced affidavits, discovery responses, and other matters outside the pleadings.

Both defendants have raised numerous arguments in support of their motions. However, due to our holding that the plaintiff lacks standing to bring his federal claims, we find it unnecessary to address several of these arguments. Unfortunately, the bulk of the unnecessarily extensive papers filed by both sides regarding these motions was preoccupied by several of the questions which we do not reach. Thus we cannot adopt in full either of the two Report & Recommendations (# 130 and # 131) issued by the Magistrate Judge on August 29, 1997, since portions of those Reports address issues which we have determined do not need to be reached. Undoubtedly, had the papers in this case been more focussed and less distractingly repetitive, the Magistrate Judge would not have been burdened with the need to address these issues either. However, we do adopt the Magistrate Judge's Reports in part, both with regard to the facts of the case and with respect to the plaintiff's age discrimination

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this way. However, such an amendment is truly not necessary in light of our holding that plaintiff lacks standing to bring a § 301 claim in the first place.

claim. Further references to these Reports will be made as relevant throughout this order.

It should also be noted that since these motions were filed, plaintiff has settled with both Greyhound and James Camp. See documents # 108, # 109, # 111, # 117, and # 119.

I. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. Northwest Motorcycle Ass'n v. U.S. Department of Agriculture, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56 (c) ; Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995) , cert. denied, 116 S. Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that

there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In evaluating the appropriateness of summary judgment, three steps are necessary: (1) determining whether a fact is material; (2) determining whether there is a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) considering that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes which are irrelevant or unnecessary will not be considered. Id. Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. Id.

II. Plaintiff Lacks Standing to Sue for Breach of the Duty of Fair Representation

Plaintiff has conceded that he was not a member of any union at the time he ceased working as Customer Service Manager for Greyhound in January of 1995. Of course, it has long been clear that a union has a statutory duty to represent fairly all members of its employee bargaining unit. Steele v.

Louisville & Nashville R.R., 323 U.S. 192, 202-03 (1944). This is true even with regard to members of the bargaining unit who are not members of the union. Karo v. San Diego Symphony Orchestra Ass'n, 762 F.2d 819, 821 (9th Cir. 1985). However, this duty does not extend to individuals who are not members of the bargaining unit. Id.; See also Walker v. Consolidated Freightways, Inc., 930 F.2d 376, 382 (4th Cir. 1991); Merk v. Jewel Companies, Inc., 848 F.2d 761, 766 (7th Cir. 1988); McTighe v. Mechanics Educ. Sec'y, Local 19, 772 F.2d 210, 213 (6th Cir. 1985) ; Scanz v. New York Times, No. CIV. 1042 (PKL) , 1997 WL 401816, at *5 (S.D.N.Y. Jul. 16, 1997) ; Smith v. ACF Industries, Inc. , Civ. A. No. 3:93-0925, 1995 WL 441279, at *2 (S.D.W. Va. 1995). Hence, non-members of the bargaining unit lack standing to sue the union for breach of that duty. Karo, 762 F.2d at 821; see also Walker, 930 F.2d at 382; Scanz, 1997 WL 401816, at *5; Smith, 1995 WL 441279, at *3.

Supervisors, by definition, are not employees. 29 U.S.C. §153 (3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . . "). Plaintiff held a supervisory position at the time he ceased to work for Greyhound in 1995, and had held such a position for the previous eight years. Unions may choose to represent supervisors, of course, but such representation is not mandatory. See Merk, 848 F.2d at 766. However, plaintiff was not a member of any bargaining unit represented by either of the defendant unions. Pl.'s Opp'n to Local 1700's

Mot. for Summ. J. (# 80) at 24 ("Plaintiff was not a member of the union at the time the events plead [sic] in the complaint occurred, and therefore he was not subject to the collective bargaining agreement between the union and Greyhound.") Thus, neither defendant owes plaintiff a duty of fair representation, and plaintiff consequently does not have standing to bring a claim for breach of that duty against either defendant.

Plaintiff's only possible claim that either defendant owed him a duty of fair representation stems from the fact that he was once a member of a different union, not party to the current action but somehow possibly related to the instant defendants, which used to represent some Greyhound employees who are now represented by defendant Local 1700.[2] Even assuming for purposes of discussion that plaintiff's former union (Local 1225) and the two defendant unions are related, the fact that plaintiff was once a union member and a member of a covered bargaining unit--and therefore was once owed a duty of fair representation--does not mean that plaintiff was owed any such duty at the time the

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[2]The parties to this action have all devoted considerable time and effort to arguments over what relationship exists, or ever existed, among these three unions, but the Court finds that no answer to this question is necessary in order to dispose of the pending motions. Thus, for purposes of the following discussion only, the two defendant unions, as well as the union to which plaintiff did in fact belong prior to 1986, will be assumed to be related entities. The Court notes, however, that it has not made any finding to this effect.

alleged breach took place. Unions do not owe a duty of fair representation either to individuals who have never been members of the bargaining unit, Karo, 762 F.2d at 821, or to individuals who were once members of the unit, but are no longer members at the time of a perceived breach. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971); McTighe, 772 F.2d at 212-13; Cooper v. General Motors Corp., 651 F.2d 249, 250 (5th Cir. 1981).

In Karo, the Ninth Circuit held that a union member who was not a member of the bargaining unit--since he was merely seeking employment under the collective bargaining agreement--was not owed any duty of fair representation by his union. Karo, 762 F.2d at 820-21. Thus, he lacked standing to sue his union for breach of that duty. Id. at 821.

Plaintiff's situation differs from that of the plaintiff in Karo in that the instant plaintiff was at one time a member of a bargaining unit covered by the collective bargaining agreement, while the plaintiff in Karo was never a member of a covered collective bargaining unit. However, Niehaus' situation is virtually identical to that of the plaintiff in McTighe, supra. In McTighe, the plaintiff had worked for twelve years in a position covered by a collective bargaining agreement, during which time he was a member of the appropriate union. He was then promoted to a managerial position not covered by the collective bargaining agreement, in which he worked for four years. At the end of this time the

company dismissed him for economic reasons, as part of a general reduction in its workforce. After being laid off, the plaintiff sought to be reinstated to his former position in the collective bargaining unit. He was not rehired, however--apparently because the union, and not the company, objected to his return. He then brought suit against both the company and the union, claiming violation of the duty of fair representation, breach of the collective bargaining agreement, and age discrimination motivated by the company's desire to reduce its pension fund obligation. The court granted summary judgment to all defendants, on the basis that the plaintiff was not covered by the bargaining agreement, and therefore had no rights thereunder. Likewise, "the Union had no duty to represent him or seek his return to the collective bargaining unit." McTighe, 772 F.2d at 212.

On appeal, the plaintiff relied on language in the collective bargaining agreement which provided that the seniority of union employees promoted to supervisory positions would be frozen, to be reclaimed by those employees should they ever return to positions covered by the collective bargaining agreement. The plaintiff also claimed that the company had a past practice of returning supervisors to such covered positions. The Sixth Circuit upheld the grant of summary judgment, however, finding that the seniority language of the collective bargaining agreement was merely permissive, not mandatory, and bestowed no right on the plaintiff to return to his pre-management position. Similarly,

any past practice of the company in returning supervisors to covered positions "was done as an exercise of discretion and not as a mandatory requirement of the agreement." Id. at 212. In so holding, the court relied heavily on the Ninth Circuit case of Karo, discussed supra.

In the instant case, the plaintiff's situation differs from McTighe's in only one substantive way--McTighe left his supervisory position involuntarily, while Niehaus did not. Even viewing the facts in the light most favorable to the plaintiff, it is clear that he voluntarily decided to leave his position in management. Whether his employer somehow took advantage of his confused belief that he was merely "transferring" "back to the unit" is at least conceivable, but it was nevertheless plaintiff who decided to leave his supervisory position. Of course, if Niehaus had been a member of the bargaining unit at the time he "left" his position, the union would have owed him a duty of fair representation. He would then have been able to satisfy the standing requirement, enabling us to reach the merits of his breach of the duty of fair representation claim. However, as the plaintiff himself has admitted, Pl.'s Opp'n to Local 1700's Mot. for Summ. J. (# 80) at 24, he was not covered by the collective bargaining agreement between Greyhound and Local 1700. Hence he lacks standing to bring suit for breach of the duty of fair representation against either of the union defendants herein, leaving us no choice but to grant both of the defendants' motions for summary judgment in respect to

this claim.

III. Plaintiff Lacks Standing to Sue for Breach of the Collective Bargaining Agreement

In order to have standing to bring suit for breach of a collective bargaining agreement, a party must either be a member of a bargaining unit covered by that agreement or a third party beneficiary of the agreement. Karo., 762 F.2d at 824; see also Sepulveda v. Pacific Maritime Ass'n, 878 F.2d 1137, 1139 (9th Cir. 1989). As discussed above, plaintiff was not a member of the Greyhound collective bargaining agreement at the time he left his position as Customer Service Manager. Thus plaintiff would have standing to bring an action for breach of that agreement only if he were a third party beneficiary thereof.

Unfortunately for the plaintiff, however, he cannot show that he was a third party beneficiary of the Greyhound collective bargaining agreement. To determine whether plaintiff is a third party beneficiary of the agreement, we look to state law, to the extent it is not inconsistent with federal labor law. See Karo, 762 F.2d at 821. Under Nevada law, for a contract to create a third party beneficiary, "there must clearly appear a promissory intent to benefit the third party." Lipshie v. Tracy Investment Co., 566 P.2d 819, 824 (Nev. 1977). Niehaus's only possible claim to third party beneficiary status stems from the "Supervisor Seniority" language of the agreement. This language at least arguably

was meant to benefit individuals who were not parties to the bargaining agreement--that is, former members of the bargaining unit who had taken management positions outside the agreement's coverage. No other provision in the agreement evinces any intent to benefit third parties in the plaintiff's position. However, unless his "right" to be returned to a job in the bargaining unit--to the extent that such a right ever existed--had somehow vested in plaintiff prior to his acceptance of a position in management, he cannot claim to be a third party beneficiary of the agreement. This is due to the fact that the collective bargaining agreement which arguably conveyed this right was no longer in effect at the time plaintiff sought to exercise the "right."

First, it is highly questionable whether the plaintiff ever had a right to return to the bargaining unit. The applicable section of the collective bargaining agreement in effect at the time Niehaus first took a management position reads as follows:

SUPERVISORY SENIORITY

> Employees under the terms of this Agreement accepting supervisory positions with the Company, the Greyhound Corporation or other Greyhound operating Divisions who have less than two (2) years seniority at the time of accepting such positions shall retain, but not accumulate seniority while in such

positions. Employees accepting such positions under this clause shall suffer no loss of seniority if they return to a Contract position within ninety (90) days after accepting such supervisory position or if on furlough at the end of the ninety (90) day period, the ninety (90) days will be extended to the time of recall to the Contract position.

All present bargaining unit members who had accepted supervisory status prior to December 3, 1983, will continue to retain and accumulate seniority as in the past. All bargaining unit members who accepted supervisory status after December 3, 1983, will be given 90 days to determine whether or not they desire to remain in the supervisory status or remain in the bargaining unit position. In the event they elect to remain in supervisory status, they will retain their accumulated seniority, but will not continue to accumulate seniority after the 90 day period. This provision will also apply to supervisory exempt positions of Local 1571.

Pl.'s Opp'n to Local 1700 's Mot. for Summ. J. at 2-3. As in McTighe, supra, this language appears to be merely

permissive. It provides that unit members accepting management positions shall retain but not accumulate seniority while in management. Nothing indicates that the company has an obligation to return employees to a position covered by the bargaining agreement. "'This provision merely provides that should the Company elect to return plaintiff, or someone in similar circumstances, to his original job, he would maintain the seniority he had acquired prior to his promotion.'" McTighe, 772 F.2d at 212 (citing Penn Packing Co. v. Amalgamated Meat Cutters, Local 195, 497 F.2d 888 (3rd Cir. 1974)). This becomes more evident when contrasted with a case in which the collective bargaining agreement at issue was held to guarantee a right of return to the unit for supervisory employees. In Woosley v. AVCO Corp., the court held that language in the collective bargaining agreement which stated "that a supervisor 'shall be entitled to return to his last held occupation in the bargaining unit'" did create a right to return. Woosley v. AVCO Corp., 944 F.2d 313, 317 (6th Cir. 1991). Thus the plaintiffs in Woosley had standing to sue for breach of the collective bargaining agreement when they were not returned to their pre-management positions upon demand.

Even if Niehaus arguably had a right to return to the bargaining unit when he first accepted his position in management, however, that right did not exist in 1994, when he first began to seek to exercise it. The collective bargaining agreement in force in 1994 provided that union employees

promoted to management positions would only retain seniority for twenty-four months. No attempt was made to provide for employees who had already been in management for over two years. Not only would this have been easy to do had the parties so desired, it had in fact been done under the previous collective bargaining agreement, as evidenced by the language quoted at length above. This clearly indicates that the drafters of the new bargaining agreement had no intent to benefit those employees in plaintiff's position--i.e., employees who had already been in management for several years.

Since plaintiff had been in management for well over two years, it is unquestionable that, under the new agreement, he had lost all his seniority. Plaintiff's own papers show that this was the position taken by Russell Buell of Local 1225, the sole representative of any union which the plaintiff contacted prior to giving notice of his resignation to Greyhound. Pl.'s Opp'n to Local 1700 's Mot. for Summ. J. (# 80) at 3 ("Buell indicated that the only negative effect of union membership reinstatement for Niehaus it appeared that he would be reinstated without his seniority (of 25 years) because he had been in management for a period of more than two years."). Without any seniority, plaintiff would have no more "right" to demand a position in the bargaining unit than an applicant who walked in off the street. Plaintiff can therefore not claim to be a third party beneficiary of the current collective bargaining agreement. Thus unless

whatever "right" he had under the agreement in effect in 1986 somehow "vested" in plaintiff prior to the agreement's modification, he cannot claim to be a third party beneficiary of any such agreement.

It has long been settled, however, that seniority does vest. Hass v. Darigold Dairy Products Co., 751 F.2d 1096, 1099 (9th Cir. 1985). "It is quite well established in this Circuit that seniority rights are creations of the collective bargaining agreement, and so may be revised or abrogated by later negotiated changes in this agreement. Employee seniority rights are not 'vested' property rights which lie beyond the reach of subsequent union-employer negotiations...." Id. In Cooper v. General Motors Corp., 651 F.2d 249 (5th Cir. 1981), a group of former union employees--who had accepted management positions under a collective bargaining agreement which provided that supervisory employees would continue to accrue seniority while in management--filed suit for an injunction preventing the implementation of revised seniority provisions under a new agreement. The revised provisions provided that management employees would retain, but not accumulate, seniority while in management--even those managers who had accepted positions in management under the belief that they would continue to accrue seniority. The court was not persuaded by the reliance argument: "Whether or not any of the plaintiffs relied on the old agreement in accepting promotions to supervisory positions is immaterial. By relying on a contract

of limited duration, imminently subject to renegotiation, they could not estop the parties from changing it." Cooper, 651 F.2d at 251. The court also dismissed the employees' claim that their seniority under the old agreement had vested: "The notion that the rights any employees, in the unit or out of it, had under the contract that terminated were vested or in any other fashion sacrosanct is devoid of support in federal labor law or contract law." Id. at 250.

Likewise, the plaintiff in the case at bar cannot claim that his seniority, or any right he may have had to return to a job in the bargaining unit, ever vested. It follows, then, that being a third party beneficiary of a prior collective bargaining agreement would be of little help to plaintiff. He must be a third party beneficiary of the current agreement in order to have standing to sue for its breach. However, as discussed above, plaintiff is not a third party beneficiary of the current agreement. Thus plaintiff lacks standing to sue for breach of the agreement, just as he lacks standing to sue for breach of the duty of fair representation, and we must grant the defendants' motions for summary judgment on this claim as well.

IV. Plaintiff Has Failed to Make Out a Prima Facie Case of Age Discrimination as to Either of the Remaining Defendants

With regard to the plaintiff's claims of age discrimination, we adopt the Magistrate Judge's Report &

Recommendation in full as to defendant Local 1700. The only facts which the plaintiff has alleged that might possibly imply that plaintiff has been discriminated against on the basis of his age are solely in relation to his employer. He has alleged nothing with respect to the unions' actions to raise any hint of impermissible discrimination. However, we find that this argument applies equally to the age discrimination claim against the defendant International Union. Had this defendant actually made this argument explicitly in the first place, the Magistrate Judge would doubtless have reached the same conclusion. Instead, the International Union relied on the argument that it could not be held responsible for the acts of its al unions. However, as the defendants point out in their Joint objections to the Magistrate Judge's Reports (# 136), it is more than a little incongruous to grant summary judgment to the Local Union on the age discrimination issue while holding that there needs to be a trial on the issue of whether defendant International Union can be held liable for the Local Union's acts of age discrimination. Therefore, we hold that summary judgment on this claim should be granted to both defendants, on the basis that plaintiff has failed to make out a prima facie case of age discrimination.

V. Plaintiff's Remaining Causes of Action Are All State Law Claims Not Preempted by Federal Law, Which We Remand to State Court

As discussed in the Magistrate Judge's Reports, both

defendants have argued that plaintiff's state law claims are all preempted by federal labor law. To the extent that plaintiff is claiming that the defendants breached the collective bargaining agreement between Greyhound and Local 1700, that is certainly true. However, plaintiff argues that he has claims that are separate and independent of the collective bargaining agreement. He claims that a separate contract existed between himself, Greyhound, and the unions that he would be able to return to a job in the bargaining unit regardless of the terms of the bargaining agreement.

"Section 301 of the Labor Management Relations Act (LMRA) preempts state law claims that are based directly on rights created by a collective bargaining agreement as well as claims that are substantially dependent on an interpretation of a collective bargaining agreement." Beals v. Kiewit Pacific Company, Inc., 114 F.3d 892, 894 (9th Cir. 1997). In Beals, the plaintiff, who was covered by a collective bargaining agreement, claimed that a separate contract existed outside of the agreement, and that the company had breached this separate agreement. The Ninth Circuit found that this claim was preempted by federal law, since the employee was in fact covered by the collective bargaining agreement.

As we have already held, Niehaus was not subject to a collective bargaining agreement. Thus any separate contract which might have existed could not have covered rights which were covered in the collective bargaining agreement, at least as far as Niehaus was concerned. Therefore his claim

that such a contract existed, and was breached, is not preempted as "based directly on rights created by a collective bargaining agreement," and so will only be preempted if it is dependent "on an interpretation" of the agreement.

In Beals, the court found that another of plaintiff's claims--that of negligent misrepresentation--was not preempted. Id, at 895. This claim was held not to require an interpretation of the collective bargaining agreement's terms. Niehaus' remaining claims are similar, in that they do not require an interpretation of the collective bargaining agreement. In fact, he cannot rely on the bargaining agreement at all in order to prove these claims, since we have held that he was not subject to the bargaining agreement and had no rights thereunder.

Niehaus' situation is similar to that of the plaintiff in Haber v. Chrysler Corp.. Haber v. Chrysler Corp., 958 F. Supp. 321, 328 (E.D. Mich. 1997). In Haber, the plaintiff was not a member of a bargaining unit, and was not covered by the collective bargaining agreement. Instead, the plaintiff claimed that there was a separate, "express agreement" between him and his employer. The court found that plaintiff's claims for breach of that separate agreement were not preempted by the LMRA, since the purpose behind the preemption doctrine developed in connection with that statute was to protect the effectiveness of collective bargaining. However, since the plaintiff was not subject to collective bargaining, but rather to individual bargaining, holding that

his claims for breach of an individual contract were preempted would not affect the interpretation of the collective bargaining agreement.

One additional argument which both Niehaus and the plaintiff in Haber seem to have raised, and which seems to have been quite persuasive to the Haber court, has undoubtedly influenced our decision on this issue. That is, if Niehaus's state law claims are preempted, but he has no standing to bring his federal law claims, then he would be without a remedy. As the court in Haber put it:

> Indeed, if the Court were to hold that Mr. Haber's claim is preempted, it would, in effect, be holding that Mr. Haber has no remedy whatsoever, because it would not only be denying him the right to a judicial remedy, but also, because Mr. Haber is not covered under the collective bargaining agreement, he has no right to arbitrate his dispute, and, therefore, he would be left with no extra-judicial remedy, either.

Id. at 329.

Therefore, we hold that Mr. Niehaus's state law claims for fraud, misrepresentation, breach of the covenant of good faith, and breach of contract (other than breach of the collective bargaining agreement) are not preempted by federal

law. However, we decline to exercise pendent jurisdiction of these claims, and remand to state court for further proceedings.

IT IS, THEREFORE, HEREBY ORDERED THAT the Report & Recommendations of the Magistrate Judge (# 130 and # 131) are adopted in part as set forth above.

IT IS, THEREFORE, HEREBY FURTHER ORDERED THAT Local 1700's motion for summary judgment (# 60) is **GRANTED IN PART AND DENIED IN PART. AND, THAT** International's motion to dismiss (# 47) is **GRANTED IN PART AND DENIED IN PART**. Both motions are granted as to plaintiff's claims for breach of the duty of fair representation, breach of the collective bargaining agreement, and age discrimination.

IT IS, THEREFORE, HEREBY FURTHER ORDERED THAT this action is remanded to the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Plaintiff's remaining claims are thereby remanded to the state court for all further proceedings, since this action was originally removed to this Court solely on the basis of the now-dismissed federal claims.

IT IS, THEREFORE, HEREBY FURTHER ORDERED THAT the Clerk shall enter judgment accordingly.

DATED: /s/September 30, 1997

/s/ Edward C. Reed

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JUDGMENT IN A CIVIL CASE

CARL E. NIEHAUS,

V. CASE NUMBER:
CV-N-96-425-ECR (PHA)

GREYHOUND LINES, INC., et al

Stamped
U.S. DISTRICT COURT
ENTERED & SERVED
/s/ Sep 30 1997
CLERK, U.S. DISTRICT COURT
BY /s/ M DEPUTY

XX **Decision by Court**. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the report and recommendations of the Magis. Judge (# 130, 131) are adopted in part; Local 1700's motion for summary judgment (# 60) is granted in part and denied in part, and that International's motion to dismiss (# 47) is granted in part and denied in part; this action is REMANDED to the Second

Judicial District Court, State of Nevada, Washoe County.

September 30, 1997
Date

Lance S. Wilson
Clerk

/s/Marti Campbell
Marti Campbell
(By) Deputy Clerk

Stamped
U. S. District Court
District of Nevada
Entered & Served
/s/Nov 19 1997
CLERK, U. S. DISTRICT COURT
BY /s/ Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CARL E. NIEHAUS,	)	
Plaintiff,	)	CV-N-96-425-ECR (PHA)
v.	)	MINUTES OF THE COURT
GREYHOUND	)	DATE: November 18, 1997
LINES, INC., et al.,	)	
Defendants.	)	
	)	

PRESENT: EDWARD C. REED, JR. Senior U. S. District Judge

Deputy Clerk: MARTI CAMPBELL
Reporter: NONE APPEARING
Counsel for Plaintiff(s) NONE APPEARING
Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

On September 30, 1997, this court issued an order (# 139) granting summary judgment to the Union Defendants on plaintiff's claims for breach of the duty of fair representation, breach of the collective bargaining agreement, and age discrimination. By the same order, we remanded all of plaintiff's remaining claims to the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

On October 10, 1997, the Union Defendants filed a joint motion to alter or amend judgment (# 141), requesting that we reconsider our remand of plaintiff's state law claims to state court, on the grounds that these claims are preempted by federal labor law. The defendants raise no arguments in support of their motion that were not raised by the parties and fully considered by this court in reaching its original decision. Thus the motion relies solely on the defendants' contention that this court "committed clear error" in holding that plaintiff's state law claims were not preempted by federal law.

While we might sympathize with the defendants' frustration at the prospect of any further action in this case, we did not err in our original holding. Under Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), and Beals v. Kiewit Pacific

Co., 114 F.3d 892 (9th Cir. 1997), plaintiff's state law claims are not preempted by federal law. The fact that a state court might need to refer to the provisions of a collective bargaining agreement to resolve some these claims does not mean that such claims are automatically preempted. Preemption occurs only where a state law claim is based directly on a right created by a CBA, or where the provisions or terms of a CBA are disputed and require interpretation. This policy is necessary to ensure the uniform interpretation of collective bargaining agreements throughout the country.

In this case, however, any dispute over the terms of the collective bargaining agreement that might have existed was resolved by our order. We clearly held that the plaintiff did not have the right to return to a bargaining unit position under the CBA. Any state court reviewing the case in the future will be bound by that decision. Whether the plaintiff can show that a separate agreement existed, independent of the CBA, that conferred this right upon him should be determined by state law contract principles, and not federal labor law. Likewise, plaintiff's breach of contract and tort claims do not require any further interpretation of the CBA, and are therefore not preempted.

The fact that we remanded plaintiff's state law claims to state court should not be taken as an indication that we necessarily expect plaintiff to succeed on any or all of those claims as

against the Union Defendants. Having decided all federal claims upon which removal to this court was based, however, it is appropriate for any further action necessary to resolve the case to be taken by the state court where this action was originally filed.

IT IS, THEREFORE, HEREBY ORDERED that the motion to alter or amend judgment (# 141) filed by the Union Defendants on October 10, 1997, is **DENIED**.

LANCE S. WILSON, CLERK
By /s/Marti Campbell
Deputy Clerk

Stamped
U. S. District Court
District of Nevada
Entered & Served
/s/Sep 2-1997
CLERK, U. S. DISTRICT COURT
BY /s/ Bertie Mansfield Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CARL E. NIEHAUS,)	CASE NO.
Plaintiff,)	CV-N-96-425-ECR (PHA)
vs.)	**REPORT AND**
)	**RECOMMENDATION**
GREYHOUND)	**OF U.S. MAGISTRATE**
LINES, INC., et al.,)	**JUDGE**
Defendants.)	
)	

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The matter was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §636 (b) (1) (B) and the Local Rules of Practice, LR-IB 1-4. Pending before the Court is a Motion for Summary Judgment filed by Defendant National Local 1700-ATU, AFL-CIO, CLC ("Local 1700" or "Local

Union") (Doc. # 60). Plaintiff Carl E. Niehaus has filed an opposition (Doc. # 80), to which Local 1700 has filed a reply (Doc. # 90). Mr. Niehaus has also filed a supplement to his opposition (Doc. # 115), to which Local 1700 has filed an opposition (Doc. # 118) and Mr. Niehaus has filed a reply (Doc. # 121). In addition, Local 1700 has filed an errata (Doc. # 86), to which plaintiff has filed an objection (Doc. # 93).

BACKGROUND

Mr. Niehaus was employed by Greyhound in a union level position for twenty-five years from 1961 to 1986, at which time he entered a management, non-union position. He claims that he was assured at that time that he could return to union status if he left Greyhound management. Mr. Niehaus remained in a management position until 1995. According to Mr. Niehaus, he made inquiries about returning to union status in 1994 and was assured he could do so. He alleges that he attempted to do so in early 1995. He contends that he was to remain a Greyhound employee, merely transferring from management to union status, but that defendants took the position that he had resigned from Greyhound completely and that, as a result, he was left with no position in management or the union. In the meantime, numerous changes took place regarding the relationship between and organization of the unions involved. Following unsuccessful attempts to resolve the dispute informally, Mr. Niehaus filed suit in state court and the action was removed to federal court.

On September 25, 1996, Mr. Niehaus filed a first amended complaint against Greyhound Lines, Inc., his former employer; James Camp, Greyhound's District Manager; Amalgamated Transit Union, AFL-CIO, CLC (the "International Union"); and the instant defendant, Local 1700. He asserted causes of action for age discrimination, wrongful termination, fraud, misrepresentation, breach of the covenant of good faith, breach of the duty of fair representation, and interference with contractual relations (Doc. # 42). The gravamen of Mr. Niehaus' complaint is that he was misled by the unions and his employer regarding his right to return to employee status from a management position and that as a result, he lost his job and his union pension rights. The relevant facts will be brought out as they pertain to each individual issue.

DISCUSSION

Standard of Review

Summary judgment is properly regarded as an integral part of the Federal Rules of Civil Procedure, not as a disfavored procedural shortcut. It is a procedure designed "to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). A defending party may move with or without supporting affidavits for summary judgment, in whole or in part, in order to "isolate and dispose of factually unsupported claims . . . ." Celotex, 477 U.S. at

323-24; see also FED. R. CIV. P. 56 (b); Coverdell v. Washington Dep't of Social and Health Services, 834 F.2d 758, 768-69 (9th Cir. 1987). Once the moving party has met its initial burden of showing the absence of material factual issues, the burden shifts to the non-moving party to set forth, by affidavits or otherwise, specific facts showing that there is a genuine material issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 - 87 (1986) ; Int'l Union of Bricklayers v. Martin Jaska, Inc. , 752 F.2d 1401, 1405 (9th Cir. 1985) ; FED. R. CIV. P. 56(e) .

Summary judgment is appropriate if, when viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Adickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970). In ruling on a motion for summary judgment, the Court must view the evidence presented "through the prism of the substantive evidentiary burden." Anderson, 477 U.S. at 254. Accordingly, the Court will address each of Local 1700' s arguments separately in turn.

1. Whether plaintiff's hybrid breach of the duty of fair representation/breach of labor contract claim is time-barred. Defendant characterizes plaintiff's claims for breach of contract and the duty of fair representation as a "hybrid Section 301/DFR" claim and contends that plaintiff's action

is time barred. It contends that plaintiff was aware of its alleged wrongdoing by late August 1995 or, at the latest, late November 1995, but did not file suit until mid June 1996, more than six months later. Defendant argues that, although there is no statutory limitations period for such actions, courts borrow the six-month limitations period from the NLRA section 10(b) for the filing of unfair labor practice charges. In addition, defendant contends that equitable tolling does not apply because plaintiff has admitted that he knew of the basis for his claim by late August 1995 and a written statement from the union is not required to start the running of the statute of limitations.

Plaintiff contends that there are questions of fact as to whether the statute of limitations has run. He claims that the date of the contract which defendants allegedly breached is January 5, 1995, the date he claims he agreed in writing to transfer to union status by vacating his supervisory position, and that therefore his claim falls well within the six year limitations period for breach of a written contract and the four year limitations period for breach of an oral contract. With regard to his claim for breach of the duty of fair representation, plaintiff first claims that if the collective bargaining agreement ("CBA") does not apply to him, then the six month limitations period is not applicable. Even if the six month limitations period applies, he claims that it should be tolled because defendants have never taken the position that they were unwilling to continue processing his claim or,

if they have, they concealed or misrepresented that fact. Thus, he contends, there is a triable issue of fact as to when he discovered his claim. Plaintiff further argues that defendant should be equitably estopped from asserting the statute of limitations because it took active steps which it should have understood would cause him to delay filing suit.

The Court's analysis presumes that plaintiff's breach of contract claim is a claim brought pursuant to section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (a) . As noted in the Discussion below pertaining to Issue 2, plaintiff's state law contract claim alleging wrongful termination based on breach of an implied contract to remain employed in a different status is preempted by federal law and would have to be restated as a Section 301 claim to go forward.

In DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), the United States Supreme Court was faced with the issue of what statute of limitations applies in an employee suit against an employer for breach of the collective bargaining agreement and against a union for breach of the duty of fair representation. Because there was no federal statute of limitations expressly applicable, the Court had to "borrow" one from some other source in federal or state law. Id. at 158. The Court, noting that the two claims were "inextricably interdependent," characterized the suit as a "hybrid § 301/fair representation claim" with no close analogy in state law, and rejected proposals to borrow various

limitations periods from state law. Id. at 164-69. The Court stated: "we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here--a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10(b) of the National Labor Relations Act [29 U.S.C. § 160(b)], which establishes a 6-month period for making charges of unfair labor practices to the NLRB." Id. at 169. Accordingly, the Court applied the six-month limitations period borrowed from the NLRA and held that one of the actions was time barred and remanded the other for consideration of tolling issues. Id. at 172. Under the NLRA, the six-month period generally begins to run when the employee discovers or should have discovered the acts constituting the alleged breach. Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986).

The Court concludes that the rule from DelCostello applies to this case. Plaintiff, like the plaintiffs in DelCostello, alleges claims for breach of contract and breach of the duty of fair representation which are inextricably interdependent. Thus, his is a "hybrid § 301/fair representation claim" to which the six-month limitations period from the NLRA applies. In his pleadings plaintiff stated that on August 31, 1995, he realized for the first time he was not dealing with a mere "administrative SNAFU," but with termination of his employment (Doc. # 42 ¶ 78), yet he did not file suit until nearly ten months later on June 12,

1996. Plaintiff contends that his last contact with a union representative was mid to late November 1995 (Doc. # 42 ¶¶ 88, 89), which is still more than six months from June 12, 1996. Thus, even giving plaintiff the most liberal benefits of the discovery rule, he did not file suit within six months of having apparently "discovered" his cause of action.

However, the Court finds that there are factual issues as to whether the doctrine of equitable estoppel applies. In the context of statutes of limitations, the doctrine of equitable estoppel applies when the plaintiff knows of the facts underlying plaintiff's cause of action but fails to file in a timely fashion because defendant's conduct caused plaintiff to delay bringing the suit, either by deliberate design or by taking actions that defendant should unmistakably have understood would cause the employee to delay filing his charge. See Dring v. McDonnell, Douglas Corp., 58 F.3d 1323, 1329 (8th Cir. 1995).

In this case, plaintiff has alleged that defendants took active steps to cause him to delay filing suit, including referring his inquiries back and forth without communicating to him their unwillingness to act on his behalf or in his favor. From these allegations it is possible that the trier of fact could conclude that defendant knew or should have known that plaintiff would delay filing suit, despite having learned that defendants considered him terminated from his employment. Accordingly, the Court concludes that there are genuine issues of material fact precluding summary judgment on this

issue.

2. Whether plaintiff's state law contract claims are preempted by federal law.

Defendant contends that plaintiff's state law contract claims are inextricably intertwined with a labor contract and are therefore preempted by federal law under LMRA Section 301. Defendant contends that plaintiff's pleadings do not establish that it had assumed any contractual duties toward plaintiff, nor, it contends, can any such duty be implied from the CBA. Even if the Court accepts plaintiff 's argument that defendant committed a breach of a verbal contract entitling plaintiff to a union job, defendant argues that federal law would govern that labor contract's interpretation, thereby preempting the state law contract claims.

Plaintiff points out that defendant inconsistently contends that he had no rights as a union member yet at the same time relies on the CBA. He contends that it is at least a triable issue of fact whether he was or was not subject to the CBA in 1995. He argues that he was not a member of the union during the relevant time period, and thus his state claims are not preempted by federal law because he was not a party to the CBA. Plaintiff claims that this is not a case where his discharge needs to be viewed in terms of his rights under the CBA, nor is interpretation of the CBA necessary to his causes of action arising under state law.

Pursuant to the Labor Management Relations Act,

1947 ("LMRA"), § 301, actions alleging violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce are to be filed in the United States district courts. See 29 U.S.C. § 185 (a). "[A] suit. . .alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." Allis-Chalmers Corp.
v. Lueck, 471 U.S. 202, 210 (1985), citing Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is preempted by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective bargaining agreements. Allis-Chalmers, 471 U.S. at 210. "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." Id. at 211. "However, if the presence of the necessary elements of a state claim can be ascertained without recourse to interpretation of the CBA, the state law remedy is not preempted." Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1062 (9th Cir. 1989). If the Court need only "consult" the CBA without construing it, the state law claim need not be extinguished. See Associated Builders & Contractors, Inc. v. Local 302 Int'l Bhd. of Elec. Workers,

109 F.3d 1353, 1357 (9th Cir. 1997).

The Court finds defendant's argument persuasive. With regard to plaintiff's claim for wrongful termination based on breach of contract and other related claims,[1] to the extent these claims arise out of alleged violations of the CBA, the CBA is without question a labor contract under LMRA § 301, interpretation of which is governed solely by federal law. See United Steelworkers v. Rawson, 495 U.S. 362, 368 (1990) (any state law cause of action for violation of collective bargaining agreements "is entirely displaced by federal law under § 301"). The allegations in plaintiff's complaint establish that these claims do arise out of alleged violations of the CBA, to wit: "[t]he union contract itself addresses the right of former union employees in supervisory positions to return to union contract positions," and "[t]he union assured plaintiff that, under the agreement between the union and Greyhound, his union membership status could be reactivated if he ever returned to a nonmanagement position in Greyhound." (Doc. # 42 ¶¶ 14, 23). Thus, to go forward plaintiff would have to restate his claim as a Section 301 claim under federal law.

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[1]Strangely, defendant cites to cases that stand for the proposition that state law tort claims are preempted by § 301, yet defendant only argues that plaintiff 's state law contract claims are preempted. However, the Court notes that a similar analysis would apply to both plaintiff's tort and contract state law claims.

Even accepting plaintiff's contention that his state contract claims arise from defendants' breach of a verbal agreement--distinct from the CBA--which provided that he remain employed with just a change of status, the Court finds that this purported agreement is not sufficiently independent of the CBA to withstand federal preemption. Defendant contends that the CBA contained a provision which allowed employees who had accepted supervisory positions to return to union status without a loss of seniority if they returned within twenty four months. Plaintiff was promoted to a management position in 1986 and sought to return to non-management union status in 1994, much more than two years later. At that time, plaintiff appears to have sought an extension or modification of the CBA such that the two year time limit would not apply to him, and alleges that he was given oral assurances that he could do so. He contends that he was promised he could return to union status should he leave management and that the promise was broken. Thus, the terms and the scope of the alleged verbal agreement are intrinsically related to the nature and existence of, and can be determined only by reference to, the CBA. Because resolution of plaintiff's state-law contract claims "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," they are therefore preempted by LMRA § 301. Allis-Chalmers 471 U.S. at 220. "The interests in interpretive uniformity and

predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." Id. at 211. Inasmuch as federal law must control the uniform meaning given to contract terms in a collective bargaining agreement, a state law action that necessarily rests on an interpretation of those terms is preempted by NLRA § 301. IBEW, AFL-CIO v. Hechler, 481 U.S. 851, 859 (1987). "[W]hen a state-law claim is substantially dependent on analysis of a collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of § 301 of the LMRA by casting the suit as a state-law claim." Id. at 859 n.3.

The agreement plaintiff refers to may be separate from or in addition to the CBA, but it is not wholly independent of it. Thus, evaluation of plaintiff's claims is inextricably intertwined with consideration of the terms of the CBA. In analyzing plaintiff's state law contract claims, the Court would be required to make assumptions about the scope of the provisions of the CBA which it has no authority to make under state law. The duties imposed and the rights established by this alleged separate oral agreement derive from the duties and rights established by the CBA and thus any attempt to assess liability inevitably would involve contract interpretation. Allis-Chalmers, 471 U.S. at 218. As plaintiff's own allegations establish a connection between the CBA and the alleged separate verbal agreement, the Court is

precluded from finding that there are factual issues as to whether the separate agreement is independent of the CBA. Accordingly, defendant is entitled to summary judgment as to plaintiff's state law contract claim.

3. Whether neither Mr. Buell nor Local 1225 were agents of Local 1700, thus causing Plaintiff's fair representation claim to fail.

Defendant contends that plaintiff claims to have relied on Mr. Russ Buell, agent of Local 1225, for promises of continued employment, but that he has neither pled nor established that Mr. Buell or Local 1225 were agents of Local 1700. Nor, it contends, can such an agency relationship exist by operation of law unless plaintiff can show more than mere fraternal relation or constitutional governance between them and can show that Local 1700 instigated, supported, ratified or encouraged activity in derogation of plaintiff's employment. It further denies that the trusteeship imposed on the local by the International Union was illegal.

Plaintiff suggests that there were close ties between the international and the local unions such that they should be treated as a single entity acting together. He contends that the International and Local 1700 comported themselves as one and the same organization during the time he was attempting to move from a management position back to a union position and that there are close, controlling connections between the International and the Locals because the International

exercised executive control over the Locals. He claims that Local 1700 was controlled by the International under an illegal trusteeship. He further contends that Local 1700, as successor to Local 1225, had taken over its responsibilities and is thus liable under the doctrine of successor liability for the its tortious acts and breach of contract. Even if defendant had no contractual connections with Local 1225, plaintiff contends that it interfered with the contract made by Mr. Buell assuring him that he could return to union status, by contributing to or causing the breach to occur.

Under the duty of fair representation doctrine, an exclusive bargaining representative has a statutory duty to exercise the power conferred upon it fairly, honestly, impartially and in good faith, without hostility or discrimination. See Vaca v. Sipes, 386 U.S. 171, 190 (1967); Steele v. Louisville & N.R. Co., 323 U.S. 192, 202-04 (1944). An international union may be liable under a theory of agency for derelictions of a local union if the international instigated, supported, ratified or encouraged the local or if the local acted pursuant to an agreement with the international. Moore v. Local Union 569, 989 F.2d 1534, 1543 (9th Cir. 1993), cert. denied, 510 U.S. 1117 (1994).

The Court concludes that there are genuine issues of material fact regarding the relationship between and among the unions which preclude summary judgment on this issue. Numerous changes took place in the unions' organizational structure during the years that plaintiff was a manager for

Greyhound. According to defendant's own "Statement of Material Facts Not Genuinely in Issue," plaintiff had been a member of Local 1225 before he entered Greyhound management and was represented in collective bargaining by the Amalgamated Council of Greyhound Local Unions, AFL-CIO, CLC ("Amalgamated Council"), but in the interim the Amalgamated Council ceased to operate as the collective bargaining representative and Local 1700 took over that function. Thus, there are questions of fact as to just which union would have been responsible for representing plaintiff at the time he sought to return to union status.

Plaintiff has raised material questions of fact regarding the relationship between the International and the Locals, and the relationship between Local 1700 and Local 1225 such that, at this stage of the proceedings, it cannot be determined as a matter of law that neither Mr. Buell nor Local 1225 were agents of defendant Local 1700. Plaintiff contends that the International imposed an illegal trusteeship on Local 1700 and exercised executive control over the Locals such that they were operating as a single entity. He further contends that Local 1700 had taken over the responsibilities of Local 1225 or at the least, acted in derogation of his employment by interfering with his contract with Mr. Buell. Although ultimately defendant's contentions may prove to be true, that is not for the Court to decide on summary judgment. The Court at this time must view the evidence in the light most favorable to plaintiff. Accordingly, summary judgment is not

warranted on the basis of this issue.

4. Whether plaintiff's claims are barred by failure to join a necessary party.

Defendant contends that Local 1225's agent, Mr. Russ Buell, upon whom plaintiff claims to have relied, was neither an agent of the International Union nor of Local 1700. Yet, it notes, plaintiff has not included Local 1225 as a party defendant. This, it contends, is fatal to plaintiff's complaint inasmuch as Local 1225 is a necessary party defendant under these circumstances.

Plaintiff does not appear to specifically address this claim, other than to claim, as noted above, that the International Union was closely connected with and exercised control over the locals.

The Rules of Civil Procedure provide for joinder of persons needed for just adjudication. They provide in relevant part as follows:

> **(a) Persons to be Joined if Feasible.**
>
> A person. . .shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to

> protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

Fed. R. Civ. P. 19(a). Failure to join a necessary party is grounds for dismissal pursuant to Fed. R. Civ. P. 12(b)(7). To determine whether a party is "necessary," the Court looks to whether complete relief is available to the plaintiff without that party and to whether that party must be joined to protect that party's own interests. United States ex rel. Morongo Band v. Rose, 34 F.3d 901, 907-08 (9th Cir. 1994).

In this case, Local 1225 does not appear to be a necessary party. It would appear that plaintiff can obtain complete relief from the named defendants and that Local 1225's interests will not be harmed if it is not named as a defendant. According to defendant, plaintiff is claiming that he had a verbal contract that entitled him to a job in Local 1700's bargaining unit. Thus, by defendant's own arguments, plaintiff's grievance is not against Local 1225, but against Local 1700. Hence, at this stage of the proceedings there is not sufficient evidence that Local 1225's absence from this litigation would impair or impede its ability to protect its interests or that plaintiff cannot obtain complete relief without it. Thus, failure to join Local 1225 would not be contrary to

the purpose of Rule 19, which is intended to protect the legitimate interests of absent parties as well as to discourage multiplicitous litigation. Morongo Band, 34 F.3d at 908. It is inappropriate for one defendant to attempt to champion an absent party's interests under such circumstances. Id. Accordingly, summary judgment is not warranted on this issue.

5. Whether plaintiff's age discrimination claim is a sham.

Defendant contends that plaintiff's claim of age discrimination is based on mere vague conclusions, not supported by facts. It claims that it had a non-discriminatory reason for advising plaintiff that he had no right to placement in a union job, namely, that the CBA did not allow an employee who had been in management for over two years to return to his previous bargaining unit position.

Plaintiff contends that he has made out a prima facie case of age discrimination. He claims that on August 16, 1994, Greyhound asked all supervisory employees for their birth dates without further explanation. He alleges that at the time of his "transfer/resignation," he was 51 years old making $43,000 per year and that he was replaced by a 37 year old making less even though he had an exemplary employment record. Plaintiff contends that defendant's motivation was to get rid of a higher salaried older employee and replace him with a lower salaried younger one.

It is unlawful under federal and state law to

discriminate against an employee on the basis of age. See Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34; NRS 613.330. The anti-discrimination laws apply to unions as well as employers. Id. The standards for establishing age discrimination are based upon the proof scheme set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1436 (9th Cir. 1990). Plaintiff must first establish a prima facie case of age discrimination. See McDonnell Douglas, 411 U.S. at 802; Merrick, 892 F.2d at 1436. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate legitimate, non-discriminatory reasons for its actions. McDonnell Douglas, 411 U.S. at 802; Merrick, 892 F.2d at 1436. If the defendant meets its burden, then the burden shifts back to plaintiff to demonstrate that the defendant's stated reason was a pretext for another motive which was discriminatory. McDonnell Douglas, 411 U.S. at 804; Merrick, 892 F.2d at 1437. The ultimate burden of establishing discrimination remains at all times with the plaintiff, however.

Here, plaintiff alleges that he was over forty years of age, had an exemplary employment record, and was replaced by a younger man at lower salary. Although plaintiff may have alleged sufficient facts to establish a prima facie case of age discrimination against his employer, none of his allegations indicate that Local 1700's actions against him were on the basis of his age. The fact that his employer

inquired about his birth date and his employer replaced him with a younger employee in no way suggests that the Local Union was motivated by age-based animus in its actions toward plaintiff. Plaintiff's claim that Greyhound and the unions were "cooperating" to terminate him on the basis of age is wholly conclusory without any evidentiary support. The fact that the parties disagreed over the interpretation of the labor contract likewise does not establish that Local 1700 discriminated against plaintiff because of his age. His mere "feeling" that age was a basis for defendant's actions, without any supporting facts, is insufficient as a matter of law to state a prima facie case of age discrimination against Local 1700. It is therefore unnecessary to continue with the McDonnell Douglas analysis, although the Court notes that defendant has articulated a legitimate, non-discriminatory reason for its actions. Accordingly, defendant is entitled to summary judgment on this issue.

CONCLUSION AND RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Local 1700's motion for summary judgment (Doc. # 60) be GRANTED IN PART and DENIED IN PART, for the reasons set forth above.

DATED this /s/29th day of August, 1997.

*/s/*Phyllis Halsay Atkins
UNITED STATES MAGISTRATE JUDGE

Stamped
U. S. District Court
District of Nevada
Entered & Served
/s/Sep 2-1997
CLERK, U. S. DISTRICT COURT
BY /s/ Bertie Mansfield Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA
* * *

CARL E. NIEHAUS,	)	CASE NO.
Plaintiff,	)	CV-N-96-425-ECR (PHA)
v.	)	**REPORT AND**
	)	**RECOMMENDATION**
GREYHOUND	)	**OF U.S. MAGISTRATE**
LINES, INC., et al.,	)	**JUDGE**
Defendants.	)	
	)	

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The matter was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §636 (b) (1) (B) and the Local Rules of Practice, LR-IB 1-4. Pending before the Court is a Motion to Dismiss filed by Defendant Amalgamated Transit Union,

AFL-CIO, CLC ("International Union") (Doc. # 47) . Plaintiff Carl E. Niehaus has filed an opposition (Doc. # 62), to which defendant has filed a reply (Doc. # 71). Plaintiff has also filed a supplement (Doc. # 112).

BACKGROUND

Mr. Niehaus was employed by Greyhound in a union level position for twenty-five years from 1961 to 1986, at which time he entered a management, non-union position. He claims that he was assured at that time that he could return to union status if he left Greyhound management. Mr. Niehaus remained in a management position until 1995. According to Mr. Niehaus, he made inquiries about returning to union status in 1994 and was assured he could do so. He alleges that he attempted to do so in early 1995. He contends that he was to remain a Greyhound employee, merely transferring from management to union status, but that defendants took the position that he had resigned from Greyhound completely and that, as a result, he was left with no position in management or the union. In the meantime, numerous changes took place regarding the relationship between and organization of the unions involved. Following unsuccessful attempts to resolve the dispute informally, Mr. Niehaus filed suit in state court and the action was removed to federal court.

On September 25, 1996, Niehaus filed a first amended complaint against Greyhound Lines, Inc., his former employer; James Camp, Greyhound's District Manager; the

instant defendant, International Union; and ATU Local 1700, a local union affiliated with International Union. He asserted causes of action for age discrimination, wrongful termination, fraud, misrepresentation, breach of the covenant of good faith, breach of the duty of fair representation, and interference with contractual relations (Doc. # 42). The gravamen of Niehaus' complaint is that he was misled by the unions and his employer regarding his right to return to employee status from a management position and that as a result, he lost his job and his union pension rights. The relevant facts will be brought out as they pertain to each individual issue.

DISCUSSION[1]

In arguing the motion to dismiss, International Union and Niehaus rely on affidavits, discovery responses, and other matters outside the pleadings. Hence, the motion to dismiss will be treated as one for summary judgment. See Fed. R. Civ. P. 12(b) (if matters outside pleadings are presented to

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[1]Plaintiff argues that this Court's ruling on an earlier motion to dismiss filed by International Union and directed at plaintiff's original complaint constitutes law of the case and bars consideration of the instant motion. However, that motion was denied as moot because the Court allowed plaintiff to file a first amended complaint (See Doc. # 41) . Thus, the Court has never considered International Union's claims on the merits. The law of the case doctrine therefore does not bar consideration of the instant motion.

It should be noted that both parties incorporate by reference their pleadings with regard to that earlier motion to dismiss (Docs. # 7, 23, 29, 30). The Court has considered those pleadings in deciding the instant motion.

court, motion shall be treated as one for summary judgment).

Standard of Review

Summary judgment is properly regarded as an integral part of the Federal Rules of Civil Procedure, not as a disfavored procedural shortcut. It is a procedure designed "to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). A defending party may move with or without supporting affidavits for summary judgment, in whole or in part, in order to "isolate and dispose of factually unsupported claims. . . ." Celotex, 477 U.S. at 323-24; see also FED. R. CIV. P. 56(b); Coverdell v. Washington Dep't of Social and Health Services, 834 F.2d 758, 768-69 (9th Cir. 1987). Once the moving party has met its initial burden of showing the absence of material factual issues, the burden shifts to the non-moving party to set forth, by affidavits or otherwise, specific facts showing that there is a genuine material issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Int'l Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985); FED. R. CIV. P. 56(e).

Summary judgment is appropriate if, when viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Adickes v. S.H. Kress and Co., 398 U.S.

144, 157 (1970). In ruling on a motion for summary judgment, the Court must view the evidence presented "through the prism of the substantive evidentiary burden." Anderson, 477 U.S. at 254.

International Union makes six arguments. The Court will address each one separately in turn.

1. Whether defendant is not plaintiff's exclusive collective bargaining representative and cannot have breached a duty of fair representation.

Defendant contends that the duty of fair representation is implied from the status of a labor organization as the exclusive collective bargaining representative of employees. It argues that it is not plaintiff's exclusive collective bargaining representative and that therefore it does not owe him any duty of fair representation. It denies being a party to, or having represented plaintiff or any employees in, any collective bargaining with Greyhound. Defendant contends that the international is merely an unincorporated association consisting of numerous affiliated local labor organizations and that the locals are the sole and exclusive employees' collective bargaining representatives. It claims that plaintiff relied on Mr. Russ Buell of Local 1225, but that plaintiff has not shown that Mr. Buell or Local 1225 were agents of the International Union or that the International Union instigated, supported, ratified or encouraged any activities pertaining to plaintiff's employment. It denies having anything whatever to do with plaintiff's employment. Accordingly, defendant

contends, it is entitled to judgment as a matter of law on plaintiff's claim that it breached the duty of fair representation.

Plaintiff contends that defendant qualifies as the exclusive bargaining representative. Plaintiff claims that, prior to the date the International Union claims to have stopped being the collective bargaining representative for Greyhound employees, it made assurances to him upon which he relied to his detriment. He contends that the International Union and Local 1700 are so closely allied that Local 1700 is merely the alter ego of the International Union, as evidenced by the International Union's involvement of its President, Mr. La Sala, in plaintiff's attempt to return to union status. Plaintiff further contends that the International Union was a party to the relevant collective bargaining agreement ("CBA"); that its President, Mr. La Sala, signed the collective bargaining agreement; and that it exercised executive control over Local 1700, Local 1225, and every other subordinate unit in the union. Plaintiff contends that in the spring of 1993 the International Union's General Executive Board named Mr. La Sala the trustee over Local 1700 to assure the terms and performance of the CBA and to carry out the International Union's objectives, and also approved contracts for Greyhound employees. Plaintiff contends that Mr. La Sala negotiated and signed the current CBA with Greyhound and controlled the local unions' operations with respect to Greyhound. Plaintiff further alleges that the International

Union violated the collective bargaining agreement by failing to reinstate his union membership and by conspiring with his employer to effect his termination, and that it breached a duty derived from its own constitution to represent him fairly in enforcing his rights under the CBA.

Under the duty of fair representation doctrine, an exclusive bargaining representative has a statutory duty to exercise the power conferred upon it fairly, honestly, impartially and in good faith, without hostility or discrimination. See Vaca v. Sipes, 386 U.S. 171, 190 (1967); Steele v. Louisville & N.R. Co., 323 U.S. 192, 202-04 (1944). An international union may be liable under a theory of agency for derelictions of a local union if the international instigated, supported, ratified or encouraged the local or if the local acted pursuant to an agreement with the international. Moore v. Local Union 569, 989 F.2d 1534, 1543 (9th Cir. 1993), cert. denied, 510 U.S. 1117 (1994).

The Court concludes that there are genuine issues of material fact pertaining to defendant's status as plaintiff's collective bargaining representative precluding summary judgment on this issue. Plaintiff has raised material questions of fact regarding the relationship between the International and the Local such that, at this stage of the proceedings, it cannot be determined as a matter of law that there was no agency relationship between them. Mr. La Sala's role as President of the International Union and as Trustee over Local 1700, as well as his involvement in plaintiff's attempt to

reenter the union, together with the other allegations made by plaintiff, raise the possibility that an agency relationship may have existed between the International and the Local. Although ultimately defendant's contentions may prove to be true, that is not for the Court to decide on summary judgment. The Court at this time must view the evidence in the light most favorable to plaintiff. Accordingly, summary judgment is not warranted on the basis of this issue.

2. Whether defendant had no nexus to plaintiff's employment and cannot have engaged in age discrimination against him.

Defendant contends that it has never represented plaintiff, has never employed plaintiff, and has never had any connection to plaintiff's Greyhound employment, termination, or any other related matter. It further denies having any agency relationship with the locals. Accordingly, it contends that it shared no employment related nexus with plaintiff whatsoever, and that therefore it could not have discriminated against him in connection with federal or state age-discrimination-in-employment laws.

Plaintiff contends that the International Union's President took decisive action to deny him his right to return to union status. He contends that when Greyhound offered him a supervisory promotion in 1986, he was assured by the union that he could return to union status if he returned to a non-management position. When in 1995 he attempted to return to union status, he claims he was given an "endless runaround" and that Mr. La Sala, President of the

International Union, wrote and told him the union's position regarding his status, which was that he had voluntarily left Greyhound's employment and failed to meet contractual requirements for moving from management back to union status. There were numerous communications between plaintiff and Mr. La Sala, culminating in a letter from Mr. La Sala telling plaintiff that the matter would be handled by the business agent of Local 1700, from whom plaintiff contends he heard nothing. Plaintiff argues that the International Union, and in particular President La Sala, have close, controlling connections with the locals, claiming that Mr. La Sala serves as trustee over the local and appointed officers of the local. He further notes that the International and the local have the same attorney.

Pursuant to the Age Discrimination in Employment Act (ADEA), it is unlawful for a labor organization to discriminate on the basis of age. See 29 U.S.C. § 623(c); see also NRS 613.330. Thus, the antidiscrimination laws apply to unions as well as employers. However, it is necessary that there be some connection between the labor union and the employee alleging age discrimination.

With regard to whether defendant had a sufficient nexus to plaintiff's employment such that these laws would apply to it, the Court concludes that there are genuine issues of material fact precluding summary judgment on this issue. The allegations in plaintiff's complaint as to both the local and the international are essentially the same as the

allegations he raised in his EEOC/NERC charge: that he was promised he could return to union status upon leaving a management position but the union refused to honor that commitment and cooperated with his employer in preventing him from obtaining union employment. These facts distinguish this case from those relied on by defendant, where the claims against the international were not closely related in law or fact to those against the employer or local union. See, e.g., Stache v. International Union of Bricklayers, 852 F.2d 1231, 1234 (9th Cir. 1987), cert. denied, 493 U.S. 815 (1989) (complaint dismissed for failure to exhaust administrative remedies where plaintiff did not name international union in administrative charges and claims against international were not closely related to claims against local); Bratton v. Bethlehem Steel Corp., 649 F.2d 658, 666 (9th Cir. 1980) (Title VII claims dismissed where plaintiff's EEOC charges neither named local or international unions nor alleged facts from which it could be inferred that they violated plaintiff's rights).

EEOC charges are to be construed with the utmost liberality. Bratton, 649 F.2d at 666. Viewing the evidence in the light most favorable to plaintiff, the Court is unwilling to conclude that this claim should be dismissed on the ground that defendant had no nexus to plaintiff's employment. The precise nature and extent of the relationship between the International Union and the locals is disputed. In addition, plaintiff relies on Mr. La Sala's deposition testimony in which

he stated that he, as trustee, had "full authority" over a subordinate local. This further calls into question the character and magnitude of their relationship. Defendant contends that Mr. La Sala's remarks to plaintiff regarding his employment and union status were "simply opinions" that were "general" and "not intended to be binding on anyone for any purpose" and that Mr. La Sala's statement to plaintiff that he was "certain" that the local president would pursue his rights was based on his "confidence in [the local president], nothing more." However, this only highlights that there are genuine issues of material fact as to the relationship between plaintiff and defendant and the connection between the international and the local. Defendant's explanations are best proffered as part of their defense at trial. It may very well be that plaintiff is confused and there is no relationship between defendant and plaintiff's employment. However, that is a matter to be decided by the trier of fact. Accordingly, summary judgment is not warranted on this issue.

3. Whether plaintiff's "hybrid section 301/DFR" claims are barred by the statute of limitations.

Defendant characterizes plaintiff's claims for breach of contract and the duty of fair representation as a "hybrid Section 301/DFR" claim and contends that plaintiff's action is time barred. It contends that plaintiff was aware of its alleged wrongdoing by late August 1995 or, at the latest, late November 1995, but did not file suit until mid June 1996, more than six months later. Defendants argue that, although

there is no statutory limitations period for such actions, Courts borrow the six-month limitations period from the NLRA section 10(b) for the filing of unfair labor practice charges. In addition, defendants contend that equitable tolling does not apply because neither it nor anyone purportedly acting as its agent did anything to induce plaintiff to sit on his rights. Accordingly, defendant contends, plaintiff's claims are time-barred.

Plaintiff contends that all of his claims are timely.[2] With regard to his breach of contract claims, plaintiff claims that the date of the "contract" is January 5, 1995, when he claims he agreed in writing to vacate his supervisory position and transfer to union status, and that he timely filed suit on June 12, 1996, well within the four year state law limitations period for breach of an oral contract and the six year period for breach of a written contract.

With regard to his claim that defendant breached the duty of fair representation, plaintiff argues that equitable tolling should result in no limitations bar due to his late discovery of this claim. He contends that, although his

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[2]In addition to arguing that his breach of contract and duty of fair representation claims were timely filed, plaintiff also argues that the six month limitations period for administratively filing his age discrimination claim was equitably tolled by his belated discovery of the basis for his claim; and that he filed his claims for fraud and misrepresentation well within the three year statutory period.

employer considered him terminated from employment as of January 15, 1995, defendants deliberately misled him into thinking he faced only an administrative "snafu" and he did not discover their true position until August 31, 1995. Therefore, he contends, he has not exceeded the relevant limitations period because the period is tolled by the discovery rule. He also argues that the limitations period should be extended based on the doctrine of equitable estoppel because defendant took active steps to cause him to delay filing suit. He claims that defendant and the local "bounced [his] simple question concerning his right to membership reinstatement, back and forth between themselves" in such a manner that they should have understood it would cause him to delay filing his charge. He claims that defendant has never reached or communicated a decision that it was unwilling to continue to process his case internally, or if it did it concealed that information from him. Thus, at the very least, he argues, it is a question of fact for trial whether the statute of limitations was tolled.

Although the introduction to defendant's motion alleges that plaintiff's claims are time barred without specifying which claims, it is clear from the accompanying memorandum of law that defendant's statute of limitations argument is directed at plaintiff's claims for breach of contract and the duty of fair representation. Accordingly, the Court will limit its discussion to those claims.

The Court's analysis presumes that plaintiff's breach

of contract claim is a claim brought pursuant to section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (a). As noted in the Discussion below pertaining to Issue 6, plaintiff's state law contract claim alleging wrongful termination based on breach of an implied contract to remain employed in a different status is preempted by federal law and would have to be restated as a Section 301 claim to go forward.

In DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), the United States Supreme Court was faced with the issue of what statute of limitations applies in an employee suit against an employer for breach of the collective bargaining agreement and against a union for breach of the duty of fair representation. Because there was no federal statute of limitations expressly applicable, the Court had to "borrow" one from some other source in federal or state law. Id. at 158. The Court, noting that the two claims were "inextricably interdependent," characterized the suit as a "hybrid § 301/fair representation claim" with no close analogy in state law, and rejected proposals to borrow various limitations periods from state law. Id. at 164-69. The Court stated: "we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here--a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10(b) of the National Labor Relations Act [29 U.S.C. § 160(b)], which

establishes a 6-month period for making charges of unfair labor practices to the NLRB." Id. at 169. Accordingly, the Court applied the six-month limitations period borrowed from the NLRA and held that one of the actions was time barred and remanded the other for consideration of tolling issues. Id. at 172. Under the NLRA, the six-month period generally begins to run when the employee discovers or should have discovered the acts constituting the alleged breach. Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986).

The Court concludes that the rule from DelCostello applies to this case. Plaintiff, like the plaintiffs in DelCostello, alleges claims for or breach of contract and breach of the duty of fair representation which are inextricably interdependent. Thus, this is a "hybrid § 301/fair representation claim" to which the six-month limitations period from the NLRA applies. In his pleadings plaintiff stated that on August 31, 1995, he realized for the first time he was not dealing with a mere "administrative SNAFU," but with termination of his employment (Doc. # 42 ¶ 78), yet he did not file suit until nearly ten months later on June 12, 1996. Plaintiff contends that his last contact with a union representative was mid to late November 1995 (Doc. # 42 ¶¶ 88, 89), which is still more than six months from June 12, 1996. Thus, even giving plaintiff the most liberal benefits of the discovery rule, he did not file suit within six months of having apparently "discovered" his cause of action.

However, the Court finds that there are factual issues as to whether the doctrine of equitable estoppel applies. In the context of statutes of limitations, the doctrine of equitable estoppel applies when the plaintiff knows of the facts underlying plaintiff's cause of action but fails to file in a timely fashion because defendant's conduct caused plaintiff to delay bringing the suit, either by deliberate design or by taking actions that defendant should unmistakably have understood would cause the employee to delay filing his charge. See Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1329 (8th Cir. 1995).

In this case, plaintiff has alleged that defendants took active steps to cause him to delay filing suit, including referring his inquiries back and forth without communicating to him their unwillingness to act on his behalf or in his favor. From these allegations it is possible that the trier of fact could conclude that defendant knew or should have known that plaintiff would delay filing suit, despite having learned that they considered him terminated from his employment. Accordingly, the Court concludes that there are genuine issues of material fact precluding summary judgment on this issue.

4. Whether Plaintiff's age discrimination claim is barred by failure to exhaust administrative remedies.

Defendant contends that plaintiff never filed with the EEOC an administrative charge of discrimination against it, and instead only filed a charge against the local. Thus,

defendant argues that plaintiff's age discrimination claim is barred by failure to exhaust his administrative remedies.

Plaintiff does not directly address this issue and appears to rely on the same arguments he made with regard to the nexus issue.

The Court concludes that there are genuine issues of material fact permitting this matter to proceed to trial. It is unclear whether plaintiff only named the local and not the international in his EEOC/NERC charge. He named "Amalgamated Transit Union," which arguably names the International Union (recall that its name is "Amalgamated Transit Union, AFL-CIO, CLC"), yet gave as its address "A.T.U. Local 1700" followed by a street address. The body of the charge refers to "Amalgamated Transit Union," which again could refer to the International (see Doc. # 1 Ex. A). Thus, with regard to plaintiff's age discrimination claim, it is not clear that he failed to exhaust his administrative remedies as to defendant such that defendant would be entitled to judgment as a matter of law. Because of these factual issues, summary judgment is not warranted on this issue.

5. Whether plaintiff's claims are barred by failure to join a necessary party.

Defendant contends that Local 1225's agent, Mr. Russ Buell, upon whom plaintiff claims to have relied, was neither an agent of the International Union nor of Local 1700. Yet, they note, plaintiff has not included Local 1225 as a party defendant. This, it contends, is fatal to plaintiff's complaint

inasmuch as Local 1225 is a necessary party defendant under these circumstances.

Plaintiff does not appear to specifically address this claim, other than to claim, as noted above, that the International Union was closely connected with and exercised control over the locals.

The Rules of Civil Procedure provide for joinder of persons needed for just adjudication. They provide in relevant part as follows:

> **(a) Persons to be Joined if Feasible.** A person. . .shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

Fed. R. Civ. P. 19 (a). Failure to join a necessary party is grounds for dismissal pursuant to Fed. R. Civ. P. 12(b)(7).

To determine whether a party is "necessary," the Court looks to whether complete relief is available to the plaintiff without that party and to whether that party must be joined to protect that party's own interests. United States ex rel. Morongo Band v. Rose, 34 F.3d 901, 907-08 (9th Cir. 1994).

In this case, Local 1225 does not appear to be a necessary party. It would appear that plaintiff can obtain complete relief from the named defendants and that Local 1225's interests will not be harmed if it is not named as a defendant. According to defendant, plaintiff is claiming that he had a verbal contract that entitled him to a job in Local 1700's bargaining unit. Thus, by defendant's own arguments, plaintiff's grievance is not against Local 1225, but against Local 1700. Hence, at this stage of the proceedings there is not sufficient evidence that Local 1225's absence from this litigation would impair or impede its ability to protect its interests or that plaintiff cannot obtain complete relief without it. Thus, failure to join Local 1225 would not be contrary to the purpose of Rule 19, which is intended to protect the legitimate interests of absent parties as well as to discourage multiplicitous litigation. Morongo Band at 908. It is inappropriate for one defendant to attempt to champion an absent party's interests under such circumstances. Id. Accordingly, summary judgment is not warranted on this issue.

6. Whether plaintiff's state law claims are preempted.

Defendant contends that plaintiff's state law contract

claims are inextricably intertwined with a labor contract and are therefore preempted by federal law under LMRA Section 301. Defendant claims that plaintiff's pleadings do not establish that it had assumed any contractual duties toward plaintiff, nor, it contends, can any such duty be implied from the CBA because the union was not a party to any labor contract covering plaintiff. Even if the Court accepts plaintiff's argument that defendant committed a breach of a verbal contract entitling plaintiff to a union job, defendant argues that federal law would govern that labor contract's interpretation, thereby preempting the state law contract claims.

Plaintiff contends that defendant violated Nevada labor laws by denying him continued employment in breach of its agreement to permit him to leave management and return to union status, which conduct also constituted a breach of the covenant of good faith and fair dealing. Even if defendant was not a party to that agreement, plaintiff contends that it acted to interfere with that agreement by conspiring with his employer and the local to discharge him from employment, in violation of Nevada law. Plaintiff contends that he is an intended beneficiary of the CBA and has standing to pursue breaches which harm him, but claims that he is relying on a verbal agreement, separate from the CBA, by which he could change his employment status from managerial to union work. He claims that defendant cannot hide behind preemption to avoid contract liability. Pursuant

to the Labor Management Relations Act, 1947 ("LMRA"), § 301, actions alleging violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce are to be filed in the United States district courts. See 29 U.S.C. § 185(a). "[A] suit . . . alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985), citing Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is preempted by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective bargaining agreements. Allis-Chalmers, 471 U.S. at 210. "[Q] uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." Id. at 211. "However, if the presence of the necessary elements of a state claim can be ascertained without recourse to interpretation of the CBA, the state law remedy is not preempted." Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1062 (9th Cir. 1989).

The Court finds defendant's argument persuasive. With regard to plaintiff's claim for wrongful termination

based on breach of contract and other related claims,[3] to the extent these claims arise out of alleged violations of the CBA, the CBA is without question a labor contract under LMRA § 301, interpretation of which is governed solely by federal law. See United Steelworkers v. Rawson, 495 U.S. 362, 368 (1990) (any state law cause of action for violation of collective bargaining agreements "is entirely displaced by federal law under § 301"). The allegations in plaintiff's complaint establish that these claims do arise out of alleged violations of the CBA, to wit: "[t]he union contract itself addresses the right of former union employees in supervisory positions to return to union contract positions," and "[t]he union assured plaintiff that, under the agreement between the union and Greyhound, his union membership status could be reactivated if he ever returned to a non-management position

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[3]Oddly, defendant cites to cases that stand for the proposition that state law tort claims are preempted by § 301, yet defendant only argues that plaintiff's state law contract claims are preempted. However, the Court notes that a similar analysis would apply to both plaintiff's tort and contract state law claims. In addition, the Court notes that by citing to federal cases which stand for the proposition that such conduct violates the NLRA, plaintiff appears to have conceded that his claim for interference with contractual relations is governed by federal law.

The cases arising under state law cited by plaintiff all involved suits between employee and employer, not between employee and union; did not involve or even mention unions; and did not discuss preemption. Therefore they have no application to analysis of this issue.

in Greyhound." (Doc. # 42 ¶¶ 14, 23). Thus, to go forward plaintiff would have to restate his claim as a Section 301 claim under federal law.

Even accepting plaintiff's contention that his state contract claims arise from defendants' breach of a verbal agreement--distinct from the CBA--which provided that he remain employed with just a change of status, the Court finds that this purported agreement is not sufficiently independent of the CBA to withstand federal preemption. The CBA contained a provision which allowed employees who had accepted supervisory positions to return to union status without a loss of seniority if they returned within twenty four months. Plaintiff was promoted to a management position in 1986 and sought to return to non-management union status in 1994, much more than two years later. At that time, plaintiff appears to have sought an extension or modification of the CBA such that the two year time limit would not apply to him, and alleges that he was given oral assurances that he could do so. He contends that he was promised he could return to union status should he leave management and that the promise was broken. Thus, the terms and the scope of the alleged verbal agreement are intrinsically related to the nature and existence of, and can be determined only by reference to, the CBA. Because resolution of plaintiff's state-law contract claims "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," they are therefore preempted by LMRA § 301.

Allis-Chalmers 471 U.S. at 220. "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." Id. at 211. Inasmuch as federal law must control the uniform meaning given to contract terms in a collective bargaining agreement, a state law action that necessarily rests on an interpretation of those terms is preempted by NLRA § 301. IBEW, AFL-CIO v. Hechler, 481 U.S. 851, 859 (1987). "[W]hen a state-law claim is substantially dependent on analysis of a collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of § 301 of the LMRA by casting the suit as a state-law claim." Id. at 859 n.3.

The agreement plaintiff refers to may be separate from or in addition to the CBA, but it is not independent of it. Thus, evaluation of plaintiff's claims is inextricably intertwined with consideration of the terms of the CBA. In analyzing plaintiff's state law contract claims, the Court would be required to make assumptions about the scope of the provisions of the CBA which it has no authority to make under state law. The duties imposed and the rights established by this alleged separate oral agreement derive from the duties and rights established by the CBA and thus any attempt to assess liability inevitably would involve contract interpretation. Allis-Chalmers, 471 U.S. at 218. As plaintiff's own allegations establish a connection between the

CBA and the alleged separate verbal agreement, the Court is precluded from finding that there are factual issues as to whether the separate agreement is independent of the CBA. Accordingly, defendant is entitled to summary judgment as to plaintiff's state law contract claim.

CONCLUSION AND RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the International Union's motion to dismiss (Doc. # 47) be GRANTED IN PART AND DENIED IN PART, for the reasons set forth above.

DATED this /s/29th day of August, 1997.

/s/ Phyllis Halsey Atkins

UNITED STATES MAGISTRATE JUDGE

Case No. CV96-03738
Dept No. 3

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JUDI BAILEY, CLERK
BY /s/C. Decker
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * * * *

Carl E. Niehaus,
Plaintiff,

vs.

Greyhound Lines Inc., and
James Camp, and
Amalgamated Transit Union, and
ATU Local 1700, and
Does 1 through 10,
Defendants

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff **Carl E. Niehaus** by and through his attorney, **Joseph E. Orzano**, alleges as follows:

PARTIES

1. Plaintiff is and was at all relevant times a resident of Washoe County, Nevada.

2. Defendant **Greyhound Lines Inc.** is, on information and belief, a corporation doing business in the City of Reno, County of Washoe, State of Nevada.

3. Defendant James Camp is, on information and belief, a resident of the State of Washington, and was at all relevant times a District Manager of **Greyhound Lines Inc.** responsible for Greyhound operations in the northwestern United States including the State of Nevada.

4. Defendant **Amalgamated Transit Union**, sometimes referred to as the "International Union" is, on information and belief, a corporation doing business as an international union in the City of Reno, County of Washoe, State of Nevada.

5. Defendant **ATU Local 1700** is, on information and belief, a corporation doing business, as an affiliated part of **Amalgamated Transit Union**, and acting as a union, either independently or as an agent of **Amalgamated Transit Union**, in the City of Reno, County of Washoe, State of Nevada.

6. A union agreement exists, on information and belief, between **Greyhound Lines** on the one side and on the other side with **Amalgamated Transit Union** or its affiliates or agents, hereinafter the "union".

7. The union agreement defined, among other things, the rights of union member employees who worked for **Greyhound**.

8. Plaintiff does not know the true names of those Defendants sued herein as **John Does** 1-10, and therefore,

plaintiff sues said defendants by fictitious names. Plaintiff is informed and believes and therefore alleges, that each of said defendants is legally responsible under the causes of actions placed herein for the events and happenings referred to and proximately caused damages to plaintiff as alleged herein. Plaintiff will seek leave to amend when the names of Does 1 - 10 are learned.

ENUMERATION OF THE FACTS UNDERLYING THIS COMPLAINT

I. ***Employment background.***

9. Plaintiff was employed by Greyhound Lines since June 27, 1961, when he was first hired as a Station Employee (non-management).

10. This position was covered under the union agreement between Greyhound Lines and the union.

11. Plaintiff continued to work in this position under a working agreement between the company and the union as a union member until 1986.

12. In 1986, plaintiff was offered the Greyhound management position of Transportation Supervisor.

13 Plaintiff notified the union, via ATU Local 1225, of this management opportunity, and inquired about his rights to return in the future to union worker status

14. The union assured plaintiff that, under the agreement between the union and Greyhound, his union membership status could be reactivated if he ever returned to a non-management position in Greyhound.

15. In reliance on this promise, plaintiff accepted the Greyhound offer of a Transportation Supervisor position.

16. Over the next eight years, plaintff continued to be promoted to higher-levels, more responsible management positions, rising from Transportation Supervisor to Operations Manager, to Chief Operations Manager, and finally to Customer Service Manager.

17. In the last position plaintiff held, as Customer Service Manager, he was directly responsible for company operations in Northern Nevada and in North Eastern California.

18. In the early part of 1992, Mr. Schmieder, the President and CEO of Greyhound Lines, informed Mr. Lynch, the Chairman of the Board of Greyhound Lines, that he was concerned about the problems the company was having with managers over the age of 40, and their lack of ability to adapt to the changes that were being implemented by corporate management.

19. Mr. Schmieder informed Mr. Lynch that older people have difficulty adjusting.

II. *Negotiating the Return from Management to Union employee Status.*

20. By 1994, plaintiff was becoming disillusioned with company operational policies and business practices.

21. In early 1994, plaintiff contacted the union (via

Local 1225) about the possibility of his return to union employee status in Greyhound Lines in a non-management role.

22. Plaintiff was informed by Russ Buell, the union business agent, from Local 1225, that there would be no problem under the union/company contract, for plaintiff to vacate his management position and return to union employee status within Greyhound Lines.

23. The union contract itself addresses the right of former union employees in supervisory positions to return to union contract positions.

24. However, Mr. Buell informed plaintiff, that under the present agreement, the only negative effect would be that he would lose any seniority that he had previously accumulated while a union member from 1961 to 1986.

25. In approximately August, 1994, plaintiff inquired of his Greyhound manager, Dennis Bishop, about the possibility of changing his working position from management to non-management under the then-current working contract, with a shift back to union employee status.

26. Mr. Bishop contacted the company's legal department at the corporate office, and later confirmed to plaintiff that there would be no problem for him to make that shift in employment status, returning to a union position with continuing employment with Greyhound.

27. In approximately August, 1994, Mr. **James Camp** replaced Mr. Dennis Bishop as the District Manager

for plaintiff's area.

28. In August 1994, the Greyhound district office in Portland ordered each operating location to communicate with all supervisory employees, asking, without further explanation, for their birth dates.

29. In the first half of 1995, Greyhound and union management mishandled plaintiff's agreed to transfer from management to non-management, by first allowing plaintiff to vacate his management position, and then refusing to follow through with the promised shift to non-management, union status.

30. As a result, plaintiff was left in a transfer hiatus, with management income stopped and non-management income not started.

31. By July, 1995, after repeated attempts by plaintiff to communicate with Greyhound and union management to complete the shift to union status to a non-management income level, plaintff began to suspect that the delay was intentional.

32. Plaintiff also began to suspect that he was possibly being discriminated against by Greyhound and the union for reasons of age.

33. One of Mr. Camp's first inquires was to obtain the birth dates of all management personnel in his new area.

III. *Attempting to complete the change from Management to Union employee Status.*

34. At the end of 1994, plaintiff came to the

conclusion that he would, in fact, prefer to return to a union position, and he explained his readiness to make the management to non-management shift to his Greyhound Lines manager, Mr. Camp.

35. Plaintiff informed Mr. Camp that he had previously discussed the shift to a non-management position with his previous Greyhound Lines manager, and with the union, and that both had assured him that he could return to union status.

36. Mr. Camp informed plaintiff that there would be no problem to his making a management to non-management change.

37. Plaintiff and Mr. Camp discussed the point that, under no circumstances, was plaintiff interested in leaving Greyhound Lines, and that plaintiff was simply willing to change his employment status to a union level position.

38. Mr. Camp agreed, and said that he would also try to get plaintiff a "buy-out package" for leaving his management position.

39. Plaintiff told him, that that would be acceptable, but only if it did not affect his continuing employment with the company.

40. Plaintiff understood that the agreement meant that there would be a break in his income flow, because all union positions are on an hourly wage basis.

41. Plaintiff understood and accepted that his

hourly wages would commence as soon as he was re-instated by the union.

42. Some days later, Mr. Camp presented plaintiff with a "buy-out package". The language in the package stated that if plaintiff accepted the package, he would be resigning from the company.

43. Plaintiff reminded Mr. Camp that he could not, under any circumstances, accept this package because he was not resigning from the company, only reverting back to a union level position.

44. Mr. Camp tried to convince plaintiff that if he signed the document, it would not affect his returning to the union and continuing to work at Greyhound in the non-management position.

45. Plaintiff told Mr. Camp that he would not sign the "buy-out package" document because he was afraid of the language which implied the signer's resignation from the company.

46. Mr. Camp again assured plaintiff that signing the document would not affect his employment with Greyhound.

47. Nevertheless, plaintiff still refused to accept sign the document and accept the offer, because he was afraid of any writing that could lead to a mis-interpretation at some later time.

48. On January 2nd, 1995, plaintiff sent a letter to Mr. Camp informing him that he was reverting back to the

union effective January 16th, 1995, in a non-management role, and with this transfer employment status, he would be relinquishing his management position.

49. Plaintiff pointed out that his notice letter was required by the company/union working agreement section.

50. Mr. Camp accepted plaintiff's letter without objection, and later filled plaintiff's management position with another person.

51. On January 5th, 1995, plaintiff also gave notice, as required by the working agreement to Ms. Janis Borchardt, assistant business agent of Amalgamated Transit Union's Local 1700, of his decision to return to the union in a Greyhound Lines non-management level, effective January 16th, 1995.

52. As of January 16th, 1995, the effective date of the transfer, plaintiff fully believed that he was still an employee of Greyhound Lines, Inc., and was simply awaiting recall by the union, and reassignment by the company to a non-management job.

53. In January and February, 1995, at the request of an attorney representing Greyhound Lines in a workmen's compensation hearing, plaintiff agreed to testify on behalf of Greyhound Lines, and did so testify on February 21, 1995, believing that he was still an employee of Greyhound Lines.

54. Plaintiff received a form letter, dated February 13th, 1995, from Greyhound Health and Welfare Department offering a COBRA package, based on his "resignation" from

the company.

55. Plaintiff responded by letter, on March 3, 1995, to correct the record with the Health and Welfare people, indicating that he had not resigned from Greyhound, and therefore had no need for COBRA, and asking asked them to straighten out their records accordingly.

56. The COBRA letter was the first indication, that there might be an administrative misunderstanding of plaintiff's agreement with company management to transfer to a non-management position, and not to resign from the company.

57. Plaintiff, believing that there was merely an administrative error, reacted only by communicating with the department that issued the COBRA letter to clarify for them that they had the wrong information, and to point out that he had in fact transferred from management, not resigned from the company.

58. Plaintiff received no further communication from the Health and Welfare personnel, nor any other indication of the company's disagreement about his transfer.

59. In fact, plaintiff received no further response of any kind from the company until he confronted them at a hearing on the matter in August 31, 1995.

60. Over the next three or four months, plaintiff made repeated, futile attempts to get the union to confirm the fact that he had transferred to a non-management position within the company and to re-instate his union status

accordingly, and, above all, to make it clear that he had not resigned.

61. Plaintiff was prevented from completing his promised transfer to a union level position by the deliberate actions of the company and the union.

62. Plaintiff communicated in March, 1995 with Ms. Janis Borchardt, again requesting return to the union, explaining the background to his decision and the transfer, and asking again for her assistance.

63. Plaintiff contacted Ms. Borchardt again in late March, 1995, asking for her reply to his two previous requests for assistance.

64. Ms. Borchardt contacted plaintiff on March 28, 1995 and informed him that she did not have the authority nor her responsibility to handle or make a decision about his request.

65. Ms. Borchardt stated that Mr. Flanagan, business agent of ATU Local 1700, had the authority and the responsibility to process plaintiff's request, and that she had fully informed Mr. Flanagan's office of plaintiff's requests and had forwarded all of plaintiff's correspondence on this matter.

66. Plaintiff immediately sent a letter, dated March 28, 1995, to Mr. Flanagan stating that Ms. Borchardt had referred his matter to Mr. Flanagan's office to process the request for return to the union.

67. Mr. Flanagan sent a letter, incorrectly dated

October 10, 1995 since it was actually received on approximately April 10, 1995, to plaintiff asking if plaintiff had notified the company (i.e. Greyhound Lines), within the required 15 days, of his intent to return to the union, and if so, to forward a copy of that letter to his office.

68. Plaintiff sent a letter to Mr. Flanagan dated April 15, 1995, enclosing a copy of his notice letter to the company, which was dated January 2, 1995, as requested by Mr. Flanagan.

69. Plaintiff also referenced the applicable provisions under the "Supervisor Seniority" section of the working agreement.

70. Plaintiff received no reply from Mr. Flanagan.

71. On June 1, 1995, plaintiff sent another letter to Mr. Flanagan requesting a reply from his office concerning his request to return to the union.

72. In July 14, 1995, plaintiff wrote to Mr. James La Sala, the International President of Amalgamated Transit Union, requesting his intervention in resolving the matter and authorizing plaintiff's return to the union as originally agreed with the company.

73. In late July, 1995, when plaintiff became alarmed that the union would not respond to his repeated requests in any constructive or diligent way, he decided to force the company to get interested in intervening with the union to accomplish his transfer to union status.

74. Plaintiff thought that the best way to achieve

this was to file for unemployment benefits and force the company to participate in a hearing to clarify their position on the matter of plaintiff's employment, and as a result, to motivate the company to intervene with the union and thus complete the transfer to union status.

75. Plaintiff filed for unemployment benefits with the State of Nevada on July 16, 1995.

76. Mr. James Camp represented Greyhound Lines, Inc. at the hearing, which took place on August 31st, 1995.

77. Mr. Camp stated, for the record, that the company's formal position was that plaintiff had resigned from the company on January 15th, 1995, and that plaintiff, therefore, had no right to receive benefits or any other rights, since he was not an employee.

78. This was the first moment when it was clear that plaintiff was not dealing with an administrative SNAFU, but with a deliberate decision to terminate his employment, and to do it under the smoke screen that somehow he had "resigned".

79. In July 25, 1995, Mr. La Sala, the union international president, wrote to plaintiff stating that he had voluntarily left his employment with Greyhound Lines, and had failed to meet contractual requirements in moving from a management position to union status.

80. Mr. La Sala also stated that plaintiff was not presently a member of the union and had no rights as a union

member.

81. In August 1, 1995, plaintiff responded in a letter to Mr. La Sala questioning the validity of Mr. La Sala's statements about his eligibility to return to the union, and about his non-member status.

82. In September 5, 1995, plaintiff sent a follow-up letter to Mr. La Sala asking for a response to his previous letter of August 1, 1995, and asking for a favorable response to plaintiff's request to return to the union position.

83. In September 27, 1995, Mr. La Sala wrote to plaintiff, enclosing a copy of a letter from Mr. La Sala, dated August 11, 1995, which plaintiff had never received, and which stated that plaintiff's matter was referred back to Mr. Flanagan, and which assured plaintiff that Mr. Flanagan will grant him any rights due to him under the union contract.

84. Plaintiff sent a letter to Mr. Flanagan, dated October 5, 1995, pointing out that Mr. La Sala had referred plaintiff's matter back to his office.

85. In October 10, 1995, Mr. Flanagan responded, stating that he would no longer respond to any of plaintiff's letters until he received a copy of plaintiff's letter to Greyhound Lines which had originally notified them of plaintiff's intention to return to the union.

86. In October 17, 1995, plaintiff immediately forwarded another copy of his original letter to Greyhound Lines, which represented the third time this letter was sent to Mr. Flanagan.

87. In October 30, 1995, Mr. Samuel Mack, the assistant to Mr. Flanagan, sent a letter to plaintiff enclosing a copy of a letter from Ms. Borchardt (dated October 24, 1995), in which she stated that, in her opinion, plaintiff had no right to return to a union position due to the fact that (1) plaintiff was not a union member when he accepted a management position in 1986, and (2) plaintiff had exceeded his two year grace period to return to the union, as she interpreted the agreement.

88. In November 7, 1995, plaintiff sent a letter to Mr. Mack pointing out that (1) he was a union member in 1986 at the time he accepted the management position with Greyhound, and (2) he would be able to provide signed statements attesting to the fact that he was a union member at that time, and finally, (3) he had written to Ms. Borchardt on March 2, 1995 and to Mr. Flanagan on April 15, 1995, pointing out that the union/company contract allows him to return to union status after more than a two year period in management.

89. Approximately two weeks later, Mr. Mack called plaintiff and asked him to send company or union documentation confirming that he had been a union member when he accepted the management position in 1986.

90. Plaintiff reminded Mr. Mack that plaintiff had no access to company or union records, but that Mr. Mack should have no problem to retrieve the union records from Ms. Borchardt's office.

91. Mr. Mack agreed to check into that source, and to call back.

92. During the phone conversation with Mr. Mack, plaintiff again offered to obtain signed statements from other union members and Greyhound managers that plaintiff was, in fact, a union member in 1986 when he accepted the management position.

93. Mr. Mack declined the offer at that time, and said he would get back to plaintiff after he had obtained the union records.

94. The phone conversation with Mr. Mack was the last direct contact that plaintiff has had with any representative of the union.

IV. *Age Discrimination.*

95. At the end of November, 1995, plaintiff was finally "fed up" and convinced that no actions on his part would resolve the matter of the promised transfer to union status.

96. Plaintiff was finally convinced that Greyhound and the union were cooperating in an effort to terminate plaintiff's employment because of his age.

97. Plaintiff was effectively fired from Greyhound on January 15, 1995.

98. Plaintiff discovered that he was fired, rather than in a job transition process, on August 31, 1995, as a

consequence of Mr. Camp's representations at a hearing on that date.

99. Plaintiff filed a complaint with NERC on December 8, 1995, and a CHARGE OF DISCRIMINATION was completed on February 2, 1996. *See Exhibit "A".*

100. Plaintiff also filed a complaint to EEOC on December 11, 1995, and a Dismissal and Notice of Rights was issued on April 12, 1996, giving Plaintiff a right to sue. *See Exhibit "B".*

101. Plaintiff alleges that the company's motivation, with the knowing cooperation of the union, was to terminate him wrongfully, in an age discriminatory manner, and to try to make it appear that he had resigned from the company.

102. In late 1994, prior to plaintiff's termination, Greyhound Lines Inc. had communicated with all supervisory employees, asking, without further explanation, for all employee birth dates.

103. At the time of his termination on January 15, 1995, plaintiff was 51 years of age, was Customer Service Manager, responsible for Greyhound operations in Northeast California and in Northern Nevada, and had an annual salary of $43,000.

104. On January 16, 1995, plaintiff was replaced by another management employee, under the age of 40, and at an annual salary of approximately $37,000 or less.

105. Plaintiff's age at the time of the hearing was 52.

106. Plaintiff's annual base wage, in his last management position at Greyhound Lines, was $43,000.

107. The person who was brought in to replace plaintiff was under the age of 40, and believed to be approximately 37 years of age.

108. Plaintiff also learned that the salary of the replacement manager was approximately $37,000.

109. All plaintiff's performance evaluations, during his long career of 33 years were positive.

110. At no time during plaintiff's employment career was he ever disciplined for improper conduct.

111. Plaintiff was successful at the performance of his job right up to the moment when he agreed to change his status from management to non-management.

112. There has never been any question about plaintiff's ability to perform his management job.

113. Plaintiff has made repeated attempts to protect his employment rights through the union, and for that matter, through the company, with absolutely no success.

FIRST CAUSE OF ACTION

(Unlawful Discrimination based on Age against all Defendants)

114. Plaintiff repeats and realleges all preceding paragraphs.

115. Defendants by their acts breached NRS 613.330 *et seq.*, which among other things, prohibits terminating employment by reason of age.

116. Plaintiff requests relief as hereinafter provided.

SECOND CAUSE OF ACTION

(Wrongful Termination based on Breach of Implied Contract from service history against Greyhound Lines Inc. and Does 1-10)

117. Plaintiff repeats and realleges all preceding paragraphs.

118. Defendants, by their acts, conspired to wrongfully terminated plaintiff's employment in violation of public policy of the State of Nevada.

119. Plaintiff requests relief as hereinafter provided.

THIRD CAUSE OF ACTION

(Wrongful Termination based on Breach of Implied Contract to remain employed but in a different status against all Defendants)

120. Plaintiff repeats and realleges all preceding paragraphs.

121. Defendants, by their acts, wrongfully terminated plaintiff when they breached the contract of continuing employment, but in a different status, between defendants and plaintiff.

122. Plaintiff requests relief as hereinafter provided.

123. Plaintiff claims compensatory and punitive damages as permitted by NRS § 42.010.

FOURTH CAUSE OF ACTION

(Fraud against all Defendants)

124. Plaintiff repeats and realleges all preceding

paragraphs.

125. Defendants fraudulently represented to plaintiff, both expressly and impliedly, that he would not be discharged, or treated as resigned, as a consequence of his vacating of his management position in order to resume his union employment position.

126. Plaintiff requests relief as hereinafter provided.

FIFTH CAUSE OF ACTION

(Misrepresentation against all Defendants)

127. Plaintiff repeats and realleges all preceding paragraphs.

128. Defendants negligently misrepresented to plaintiff, both expressly and impliedly, that he would not be discharged, or treated as resigned, as a consequence of his vacating of his management position in order to resume his union employment position.

129. Plaintiff requests relief as hereinafter provided.

SIXTH CAUSE OF ACTION

(Breach of Covenant of Good Faith against Greyhound Lines, Amalgamated Transit Union, and ATU Local 1700)

130. Plaintiff repeats and realleges all preceding paragraphs.

131. Defendants **Greyhound, Amalgamated Transit Union, and ATU Local 1700,** by their acts, breached the implied covenant of good faith and fair dealing present in every contract, including the contract of continued employment between the defendants and plaintiff.

132. Plaintiff requests relief as hereinafter provided.

133. As a result, plaintiff claims compensatory damages in excess of $10,000 and punitive damages as permitted by NRS §§ 42.010 and 42.005.

SEVENTH CAUSE OF ACTION

(Breach of Duty of Fair Representation against Amalgamated Transit Union and ATU Local 1700)

134. Plaintiff repeats and realleges all preceding paragraphs.

135. Defendant Amalgamated Transit Union and ATU Local 1700, by its acts, breached its duty of fair representation to plaintiff, by, among other things, when it failed to respond in an honest attempt to reach a correct decision in response to plaintiff's grievance about not obtaining immediate reinstatement to union status as he had been promised, and had accordingly relied on when he agreed to vacate his management position with the company.

136. Plaintiff requests relief as hereinafter provided.

EIGHTH CAUSE OF ACTION

(Interference with Contractual Relations against Amalgamated Transit Union, and ATU Local 1700 and James Camp)

137. Plaintiff repeats and realleges all preceding paragraphs.

138. Defendants **Amalgamated Transit Union, and ATU Local 1700 and James Camp,** by their acts, interfered with plaintiff's contract with **Greyhound Lines** for

continued employment under a union status, which caused plaintiff to be effectively terminated by Greyhound Lines.

139. Plaintiff requests relief as hereinafter provided.

JURY DEMAND

140. Plaintiff requests trial by jury as permitted by Rule 38.

WHEREFORE, plaintiff requests the court to award:

1. Compensatory damages in amounts in excess of $ 10,000.
2. Punitive damages as permitted by NRS 42.005.
3. Back pay.
4. Front pay;
5. Attorneys' fees and costs; and
6. Such other relief as may be deemed appropriate.

/s/ Dated 7/9/96.

/s/J.E. Orzano
Joseph E. Orzano
Plaintiff's Attorney

AFFIDAVIT

STATE OF NEVADA)
:ss
COUNTY OF WASHOE)

COMES NOW Carl E. Niehaus duly sworn under penalty of perjury and deposes and says:

1. I am the plaintiff herein.

2. I make this affidavit of my own personal knowledge and belief.

3. I have read the foregoing First Amended Complaint and know the contents thereof, and the same is true of my own knowledge, except those matters therein stated upon information and belief, and as to those matters I believe them to be true.

/s/Carl E. Niehaus
Carl E. Niehaus

Subscribed and sworn to before me this /s/9th day of July 1996.

/s/ Rhonda L. Grandi
Notary Public
Stamped
Rhonda L. Grandi
Notary Public-State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES FEB. 25, 1997

Supreme Court, U.S.
FILED
OCT 7 1999
OFFICE OF THE CLERK

No. 99-326

In The
Supreme Court of the United States

AMALGAMATED TRANSIT UNION, and
ATU LOCAL 1700,
Petitioners.

vs.

CARL E. NIEHAUS,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH E. ORZANO
Counsel of Record
323 California Ave. (Suite 1)
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(775) 323-2122

QUESTIONS PRESENTED

1. Is the Court of Appeals, Ninth Circuit decision at variance with Petitioners' cited decisions from two other Circuits?

2. Were Niehaus' state law claims based on interpretation of the collective bargaining agreement, and if so, did Niehaus disavow reliance on that agreement for the first time on appeal?

4. Must a court consider only the complaint, and not anything else after the complaint is submitted, in deciding whether a state claim is preempted?

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STATEMENT OF THE CASE

The Unions (ATUI and Local 1700) are attempting to appeal a Court of Appeals, Ninth Circuit affirming of a district court's remand of pendent state claims with the argument that those claims should be preempted by labor law.

Niehaus makes the following principal counter arguments in support of his contention that the Petition for Writ of Certiorari should be denied:

(1) The Ninth Circuit decision is not at variance with Petitioners' cited decisions from two other Circuits;

(2) The state law claims were not based on interpretation of the collective bargaining agreement;

(3) Niehaus did not disavow reliance on the collective bargaining agreement for the first time on appeal; and

(4) Petitioners are wrong in their argument that a court may consider only the complaint, and not anything else after the complaint is submitted, in deciding whether a state claim is preempted.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE THIRD AND ELEVENTH CIRCUITS, NOR WITH THE U. S. SUPREME COURT.

Contrary to Petitioners' contentions, the Ninth Circuit's decision **does not** conflict with those of the Third and Eleventh Circuits in *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) and *Redmond v. Dresser Indus., Inc.*, 734 F.2d 633 (11th Cir. 1984), **nor is it inconsistent** with *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

Allis-Chalmers is readily distinguishable from the Niehaus case. Lueck was a union member (*Id.* at 203); Niehaus was not a union member. Lueck's complaint required interpretation of the labor contract because it depended upon whether the employer's conduct breached an implied labor contract provision. (*Id.* at 214 and 220).

Niehaus' state law claims do not involve breach of the labor contract, nor do they rely on an interpretation of the labor contract, as confirmed in the findings of both the Federal District Court and the Court of Appeals, Ninth Circuit decisions. The *Allis-Chalmers* holding does not contradict the *Niehaus* holding.

Redmond v. Dresser Indus., Inc., 734 F.2d 633 (11th Cir. 1984) is also readily distinguishable from the Niehaus case. Redmond, like Niehaus, was not a union member at the times relevant to his state claims, but Redmond was not suing his employer on any separate contract; he was suing on the basis of his employer's failure to adhere to the terms of the labor contract. (*Id.* at 635).

Again, Niehaus' state law claims do not involve breach of the labor contract, nor do they rely on an interpretation of the labor contract, as one can see in the findings of both the Federal District Court and the Court of Appeals, Ninth Circuit decisions. The *Redmond* holding does not contradict the *Niehaus* holding.

Malia v. RCA Corp., 794 F.2d 909 (3rd Cir.1986), *cert. denied*, 482 U.S. 927 (1987) supports the *Niehaus* decision in the Ninth Circuit. In *Malia* the court found that "Malia's Complaint also alleges facts that would support a claim for breach of an oral contract." (*Id.* at 912).

> "Thus, because we construe Malia's Complaint as alleging a state-law breach of contract claim based on an oral employment contract we conclude that that claim and Malia's state-law tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the Local 178

collective bargaining agreement." (*Id.* at 913).

The *Malia* holding is perfectly consistent with the *Niehaus* holding. In fact its findings, as well as its holdings, read like almost an identical case to the *Niehaus* case.

In summary, Neither *Redmond* nor *Malia* conflict with the decisions below, and furthermore, neither even address the question on which Petitioners seek review. In both cases, a supervisor plaintiff sued his union and his employer over breaches of an alleged promise to permit him to return to the bargaining unit.

In *Redmond* the plaintiff was relying solely on a promise found in the collective bargaining agreement, and the court held his claim preempted.

In *Malia* the plaintiff relied both on the collective bargaining agreement and on a separate oral promise, and the court held the former claim preempted but the latter not preempted.

Both cases are thus entirely consistent with the holding of the District Court and the Court of Appeals, Ninth Circuit on the preemption issue.

II.

THE STATE LAW CLAIMS WERE NEVER BASED ON INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT, AND NIEHAUS DID NOT DISAVOW RELIANCE ON THAT AGREEMENT FOR THE FIRST TIME ON APPEAL.

A. Niehaus Disavowed Reliance on the Interpretation of the Collective Bargaining Agreement During the Federal District Court Proceedings as Shown in the Findings of That Court.

The Unions' principal claim, under QUESTIONS PRESENTED in their Petition to this Court, is that Niehaus"disavowed reliance on the [collective bargaining agreement] for the first time on appeal," that the "complaint alleges state-law claims that require interpretation of the labor contract," and that plaintiff is attempting to "evade pre-emption under Labor Management Relations Act §301 by disavowing reliance on the labor contract on appeal." (Pet. Cert. at page *i*).

On the contrary, Niehaus disavowed reliance on the labor contract with respect to his state claims before the Federal District Court, and that court, in its remand order of 9/30/97 found as follows:

> " ... plaintiff argues that he has claims that are separate and

> independent of the collective bargaining agreement. He claims that a separate contract existed between himself, Greyhound, and the unions that he would be able to return to a job in the bargaining unit regardless of the terms of the bargaining agreement. (Pet. Cert. at Apdx. B37).

B. Also, Niehaus Did Not Indicate Reliance on the Collective Bargaining Agreement with Respect to His State Claims in the First Amended Complaint.

Niehaus' Third through Sixth, and Eighth Causes of Actions became his remanded state law claims. (Pet. Cert. Apdx B-111 through B114, ¶¶120-133 and ¶¶137-139)

Each of these causes of actions relates to the separate promissory contracts between Niehaus and the Greyhound and Union defendants which assured Niehaus that he could transfer from management to a union level, working position and rejoin the union.

Not one of these state law causes of actions in the First Amended Complaint made any reference to the collective bargaining agreement.

Furthermore, If we examine the "Enumeration of the Facts Underlying This Complaint" (starting at Pet. Cert. Apdx B-95) in Niehaus' First Amended Complaint, we find that it explains that Niehaus first checked with a union official (Russ Buell) to investigate whether or not the collective bargaining agreement provided for union membership reinstatement with seniority or, on the other hand, presented any obstacle to union membership reinstatement. He learned that the collective bargaining agreement seniority clause did not apply to him any longer (since he had been in management more than two years), and that the agreement did not present any obstacle to rejoining the union. (Pet. Cert. at Apdx B-97, ¶22 &24).

Niehaus wisely did not resign until after he was assured by Greyhound management (Dennis Bishop) and by a union official (Russ Buell) that they would each cooperate in shifting him from management to a union member working position. (Pet. Cert. Apdx B-97, ¶ 22).

These were critical promises for Niehaus, because he needed to be certain that he would have employment continuity in order to safeguard his pension, and also to further contribute to it during his final working years.

A fair reading of the state causes of actions and the factual narrative presented in the First Amended Complaint reveals that Niehaus

complained about a promissory contract for continued employment completely independent of the collective bargaining agreement.

III.

THERE IS ALSO NO CONFLICT WITH THE THIRD AND ELEVENTH CIRCUITS, NOR SUPPORT FOR PETITIONERS' CONTENTION THAT A FEDERAL DISTRICT COURT CAN CONSIDER ONLY THE COMPLAINT IN DECIDING WHETHER OR NOT TO REMAND STATE CLAIMS.

Petitioners are simply wrong in arguing that a court may consider only the complaint, and not anything said after the complaint if submitted. It is true that the question of whether removal is proper is to be decided based on the complaint (subject of course to the well-pleaded complaint doctrine).

But it is also clear that a party may affect the decision of the District Court whether to undertake a discretionary remand of a state law claim. Thus in *Carneigie-Mellon v. Cohill*, 484 U.S. 343 (1988) the U.S. Supreme Court responded to the expressed concern that plaintiffs might manipulate the process by dropping federal-sounding parts of their claims in order to secure a remand, not by saying that such a tactic could or should never succeed in obtaining a remand, but rather by urging the lower courts to exercise their

discretion to deny a remand when it appeared that the plaintiff was being manipulative.

Here, the District Court chose to accept plaintiff's characterization of his state claims, stated in the complaint, as not relying at all on language in the collective bargaining agreement.

In both *Redmond* and *Malia* the courts discussed those plaintiffs' claims by reference to the complaint and the arguments made in district court or appellate briefs, and the arguments could have been considered in deciding how to characterize those plaintiffs' claims, and thus whether to hold the claims preempted.

Nor for that matter, was there any discussion of this question in *Allis-Chalmers*.

The opinion of the Court of Appeals below is devoid of any discussion of this supposedly pressing procedural question that is so vital that Petitioners urge it as a basis for the Court's adding this case to its docket.

In short, the decision below does not conflict with any case referred to by Petitioners, or of which we are aware.

CONCLUSION

1. The Ninth Circuit's holding does not conflict with those of the Third and Eleventh Circuits.

2. Niehaus' state law claims were not based on interpretation of the collective bargaining agreement.

3. Niehaus did not disavow reliance on the collective bargaining agreement for the first time on appeal as Petitioners' claimed. (Pet. Cert. 16).

4. Niehaus' First Amended Complaint itself does not base his state claims on interpretation of the collective bargaining agreement.

5. Petitioners' provided no authority to back up their claim that a Federal District Court can consider only the complaint in deciding whether or not to remand state claims.

The Petition for Writ of Certiorari should be denied.

DATED:

Respectfully submitted,

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